(10)

No. 05-11287 *** CAPITAL CASE ***

Title: Brent Ray Brewer, Petitioner

v.

Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division

Docketed: June 2, 2006

Lower Ct: United States Court of Appeals for the Fifth Circuit

Case Nos.: (04-70034)

Decision Date: March 1, 2006

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
May 30 2006	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 3, 2006)
Jun 29 2006	Order extending time to file response to petition to and including July 17, 2006.
Jul 14 2006	Brief of respondent Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division in opposition filed.
Jul 17 2006	Brief amici curiae of Deryl Madison, et al. filed.
Jul 27 2006	DISTRIBUTED for Conference of September 25, 2006.
Aug 10 2006	Record Requested .
Aug 14 2006	Reply of petitioner Brent Ray Brewer filed. (Distributed)
Aug 30 2006	Record received from the US Court of Appeals for the 5th Circuit (one box).
Sep 14 2006	Record received from U.S.D.C. for the Nothern District of Texas (Amarillo) (2 boxes)
Sep 28 2006	DISTRIBUTED for Conference of October 13, 2006.
Oct 13 2006	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED and consolidated with No. 05-11284. A total of one hour is allotted for oral argument.
Oct 19 2006	Motion to appoint counsel filed by petitioners Brent Ray Brewer. VIDED.
Oct 25 2006	Motion DISTRIBUTED for Conference of November 9, 2006.
Oct 31 2006	SET FOR ARGUMENT ON Wednesday, January 17, 2007.
Nov 13 2006	Motion to appoint counsel filed by petitioner GRANTED. Robert C. Owen, Esquire of Austin, Texas is appointed to serve as counsel for petitioner in this case.
Nov 27 2006	Brief amici curiae of Child Welfare League of America, et al. filed. VIDED.
Nov 27 2006	Brief of petitioner Brent Ray Brewer filed.
Nov 27 2006	Brief amici curiae of American Academy of Child and Adolescent

	Psychiatry, et al. filed. VIDED.
Nov 27 2006	Joint appendix filed.
Dec 4 2006	CIRCULATED.
Dec 14 2006	Motion to vacate and remand for further consideration in light of Nelson v. Quarterman, ___ F.3d___-, 2006 WL 3592953 (5th Cir., December 12, 2006) (en banc). filed by petitioner Brent Ray Brewer.
Dec 18 2006	Response of Quarterman in opposition to motion to vacate and remand filed.
Dec 20 2006	Motion DISTRIBUTED for Conference of January 5, 2007.
Dec 23 2006	Petitioner's reply to respondent's opposition to motion to vacate and remand filed.
Dec 27 2006	Supplemental letter to response in opposition to motion to vacate and remand. VIDED.
Jan 2 2007	Brief of respondent Nathaniel Quarterman, Director, Texas Department of Criminal Justice, Correctional Institutions Division filed. (Distributed)
Jan 8 2007	DISTRIBUTED for Conference of January 12, 2007.
Jan 9 2007	Reply of petitioner Brent Ray Brewer filed. (Distributed)
Jan 16 2007	Petition DENIED.
Jan 17 2007	Argued. For petitioner: Robert C. Owen, Austin, Tex. (Appointed by this Court.) For respondent: Edward L. Marshall, Assistant Attorney General, Austin, Tex.

Filedate
May 30, 2006

(6)

No. 05-11287

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

BRENT RAY BREWER,
Petitioner,

-v-

DOUG DRETKE, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THIS IS A CAPITAL CASE.

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QUESTIONS PRESENTED

CAPITAL CASE

1. Do the former Texas "special issue" capital sentencing jury instructions – which permit jurors to register only a "yes" or "no" answer to two questions, inquiring whether the defendant killed "deliberately" and probably would constitute a "continuing threat to society" – permit constitutionally adequate consideration of mitigating evidence about a defendant's mental impairment and childhood mistreatment and deprivation, in light of this Court's emphatic statement in Smith v. Texas, 543 U.S. 37, 48 (2004), that those same two questions "had little, if anything, to do with" Smith's evidence of mental impairment and childhood mistreatment)?

2. Do this Court's recent opinions in Penry v. Johnson, 532 U.S. 782 (2001) ("Penry II") and Smith, both of which require instructions that permit jurors to give "*full* consideration and *full* effect" to a defendant's mitigating evidence in choosing the appropriate sentence, preclude the Fifth Circuit from adhering to its prior decisions – antedating Penry II and Smith – that reject Penry error whenever the former special issues might have afforded some indirect consideration of the defendant's mitigating evidence?

3. Has the Fifth Circuit, in insisting that a defendant show as a predicate to relief under Penry that he suffers from a mental disorder that is severe, permanent or untreatable, simply resurrected the threshold test for "constitutional relevance" that this Court emphatically rejected in Tennard v. Dretke, 542 U.S. 274 (2004)?

4. Where the prosecution, as it did here, repeatedly implores jurors to "follow the law" and "do their duty" by answering the former Texas special issues on their own terms and abjuring any attempt to use their answers to effect an appropriate sentence, is it reasonably likely that jurors applied their instructions in a way that prevented them from fully considering and giving effect to the defendant's mitigating evidence?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2005

BRENT RAY BREWER,
Petitioner,

-v-

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Texas death row prisoner BRENT RAY BREWER ("Petitioner") respectfully asks this Court to grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit in his case.

OPINIONS BELOW

The Fifth Circuit's opinion, Brewer v. Dretke, is reported at 442 F.3d 273 (5th Cir. 2006) and attached as Appendix A. The District Court's opinion, Brewer v. Dretke, No. Civ. A. 2:01-CV-0112-J (N.D. Tex. (Amarillo) 2004), is attached as Appendix B.

JURISDICTION

The Fifth Circuit entered judgment on March 1, 2006. Rehearing was not sought. This Petition is timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment guarantee against cruel and unusual punishment, applicable against the States through the Fourteenth Amendment's due process clause, and the pre-1991 version of the Texas capital sentencing statute, Tex. Code Crim. Proc. art. 37.071. Appendix C contains the text of each.

STATEMENT OF THE CASE

A. Procedural History

Petitioner was convicted and sentenced to death in Randall County, Texas for the murder of Robert Laminack during a robbery. His conviction and sentence were affirmed on appeal, and this Court declined review. Brewer v. State, No. 71,307 (Tex. Crim. App. 1994) (unpublished), *cert. denied*, Brewer v. Texas, 514 U.S. 1020 (1995).

Petitioner unsuccessfully sought state post-conviction relief, which was denied in an unpublished order. *Ex parte* Brewer, No. 46,587-01 (Tex. Crim. App. 2001).

Petitioner filed a habeas petition in the District Court on May 7, 2001. After the District Court requested additional briefing in light of Tennard v. Dretke, 542 U.S. 274 (2004), it granted relief as to sentence. *See* Appendix B. Respondent appealed; a panel of the Fifth Circuit reversed. Brewer v. Dretke, 410 F.3d 773 (5th Cir. 2005). Petitioner's timely petition for rehearing *en banc* was eventually denied, but upon denial of rehearing the panel withdrew its original opinion and substituted another. *See* Brewer, 442 F.3d at 275. Petitioner did not again seek rehearing.

This Petition follows.

B. Facts Material to Consideration of the Questions Presented

Petitioner was convicted and sentenced to death for the murder of Robert Laminack.

Significant mitigating evidence was introduced at Petitioner's trial, including details about Petitioner's abused background and mental illness. Petitioner and his mother were subjected to extensive physical abuse at the hands of Petitioner's father, and such abuse caused Petitioner to become violent to protect his mother from his father's assault – a fact that the prosecution emphasized in closing argument as supporting an affirmative answer to the "future dangerousness" special issue. RR XIX at 897.[1] The defense also introduced evidence establishing that Petitioner suffered from depression severe enough to have required his involuntary commitment to a psychiatric hospital just three months before his offense. The District Court summarized the evidence as follows:

> At trial, witnesses testified that Petitioner was emotionally and physically abused by his father, that he suffered severe depression, and that just three months before the murder, Petitioner was committed to a psychiatric hospital where he fell under the influence of his co-defendant who dominated and manipulated him.
>
> Petitioner did not know his father until he was fifteen years old. After his father, Albert, reconciled with Petitioner's mother, Karon, Albert abused both Karon and Petitioner. Karon testified that Albert hit Petitioner numerous times with items such as the butt of a pistol, a flashlight, and his fists. During one episode, Albert tried to hit Petitioner with a stick of firewood. When Albert went outside to get the firewood, Karon slammed the front door and locked it. After Albert busted the glass out of the front door with the firewood, Karon called the police and Albert was arrested.
>
> Petitioner witnessed the physical abuse of his mother by his father. Petitioner would get between his parents. At one point, Albert, a Vietnam veteran who suffers from post-traumatic stress disorder and depression, stated, "If your (sic) ever draw your hand back, you'd better kill me, because I'll kill you." There followed a violent confrontation with his son that landed Albert in the hospital. In his testimony, Albert conceded that Petitioner was only seeking to protect his mother by getting into a fight between Albert and Karon and stopping Albert's attack, which included throwing chairs at Karon. Albert acknowledged

[1] We cite the transcript of testimony from Petitioner's trial as "R.R." ("Reporter's Record") and the pleadings, orders, etc., of the trial court as "C.R." ("Clerk's Record"). *See* Tex. R. App. Proc. 34 and notes and commentary thereto (defining "Clerk's Record" and "Reporter's Record").

> that the incident was his fault and that he needed to be stopped. He testified that Petitioner was distraught over the injuries which he had caused his father. Despite the testimony by Albert, the prosecution used this incident in its closing argument as an example of how Petitioner might pose a continuing threat to society.
>
> Petitioner became severely depressed and just three months before the murder of Robert Laminack he was involuntarily committed to a psychiatric hospital after making suicide threats.

Appendix B at *1-*2.

Petitioner's trial counsel "submitted no fewer than seven proposed instructions designed to give effect to mitigating evidence," including "an entirely separate proposed special issue on mitigation evidence;" "[e]ach of these requests was denied." Id. at *2. As a result, the jury was instructed to answer only the "deliberateness" and "future dangerousness" special issues of the pre-1991 Texas capital sentencing scheme. *See* Appendix C. Defense counsel nonetheless sought to encourage jurors to respond to Petitioner's mitigating evidence by answering "no" to one of the special issues. The prosecution fought to undermine this effort, vehemently arguing that under their instructions the jurors had no authority to render a moral judgment about whether Petitioner should live or die. RR XIX at 894 (stating that the jury does not "have the power to say whether [Petitioner] lives or dies"). Instead, the prosecution insisted: "You answer the questions according to the evidence, must [sic] like you did at the guilt or innocence. That's all. It's not a matter of life and death." RR XIX at 894.

C. How The Issue Was Raised And Decided Below

As noted *supra*, the trial court made no modifications of the standard "deliberateness" and "future dangerousness" special issues of the former Texas scheme in response to the multiple requests submitted by Petitioner's trial counsel for instructions that would permit jurors to give effect

to Petitioner's mitigating evidence. Petitioner, citing Penry I, challenged the denial of additional instructions in his application for state post-conviction relief. The state courts "continued to assert that a mitigating evidence instruction was not necessary." Appendix B at *2.

The District Court found the state courts' denial of relief under Penry an objectively "unreasonable application of federal law and Supreme Court precedent." Id. at *5. It explained that, just as in Penry I, the unadorned pre-1991 special issues "were an inadequate vehicle for the jury to give effect to [Petitioner's] relevant mitigating evidence." Id. Pointing out that the mitigating evidence did "not fit squarely" into either the deliberateness or dangerousness issues, and that "in light of the special issues, a jury would be very hard pressed to see the evidence presented as anything but aggravating," the District Court concluded that "[t]he mitigating evidence presented may have served as a basis for mercy even if a jur[or] decided that the murder was committed deliberately and that Petitioner posed a continuing threat." Id. Without some additional instruction, however, jurors could not express that reasoned moral response, placing the full mitigating value of Petitioner's evidence "out of the jury's reach." Accordingly, the District Court concluded, the state courts applied Penry in an objectively unreasonable manner in denying relief. Id.

The Fifth Circuit reversed. It conceded that the jury had heard "a variety of mitigating evidence" about Petitioner, "including the following facts: that he had a bout with depression three months before the murder; that he was briefly hospitalized for that depression; that his co-defendant, a woman with whom he was apparently obsessed, dominated and manipulated him; that he had been abused by his father; that he had witnessed his father abuse his mother; and that he had abused drugs." Brewer, 442 F.3d at 275. It undertook its analysis of Petitioner's Penry claim, however, by first declaring that Smith's demand that instructions permit jurors to give "*full* consideration and *full*

effect" to mitigating evidence was simply a matter of "semantics," because "[e]ven if the requirement is called 'full,' it means nothing more than 'sufficient.'" Id. at 278-79. Then, it minimized the significance of Petitioner's evidence of mental illness, which it criticized as "not based on an especially strong factual predicate," since Petitioner was "not adjudged mentally retarded" and had suffered only a "single episode" of clinical depression "without psychotic features." Id. at 275 n.1; *see also* id. at 275 (no "expert psychological or psychiatric evidence" of Petitioner's condition was presented), 279 (Petitioner's evidence reflected only "a single episode of non-psychotic major depression").[2]

The Fifth Circuit then rejected the argument that Petitioner's mental illness raised a Penry problem, applying the following *per se* rule: "This circuit has made a distinction between mental retardation and mental illness. [M]ental illness ... does not require any adjustment to the standard two-pronged interrogatory, and we have rejected habeas petitions on these grounds on other occasions. The only instances in which mental illness has given rise to Penry I violations involve those where the illness in question is chronic and/or immutable." Id. at 280 (footnotes omitted). Since no evidence indicated that Petitioner's mental illness was "chronic and/or immutable," Penry relief was *ipso facto* unavailable. Id. As in other recent cases, such as Coble v. Dretke, 444 F.3d 345 (5th Cir. 2006), the court supported this conclusion with citations to its pre-Smith opinions in Lucas v. Johnson, 132F.3d 1069 (5th Cir. 1998); and Robison v.Johnson, 151 F.3d 256 (5th Cir. 1998), both

[2] The Fifth Circuit also asserted, apparently relying on Respondent's characterization of the record, that Petitioner's admission to a mental hospital was "voluntary." Brewer, 442 F.3d at 275 n.1 ("The state's brief reveals ... [that Petitioner] signed a request for *voluntary admission to* Big Springs State Hospital ....") (emphasis in Fifth Circuit opinion). This was incorrect. Petitioner was originally involuntary admitted for treatment pursuant to a court order. RR XVIII at 760. The admission became "voluntary" only when Petitioner subsequently signed a request to remain in treatment after

of which had held that evidence of any episodic or even arguably treatable mental illness could be given sufficient mitigating consideration under the "future dangerousness" question of the pre-1991 statute.

The court below applied a similar analysis to the evidence that Petitioner had suffered physical and psychological abuse as a child. It first suggested that the evidence was immaterial because, in the court's view, the abuse Petitioner suffered was not as severe as that experienced by Penry himself:

> ... [There is] a constitutional distinction between, on the one hand, "severe" abuse of the type Penry sustained and, on the other, a "mere" troubled childhood .... There is no easy way to locate Brewer at either pole. ... [T]he trial evidence indicates that Brewer's father hit Brewer 'numerous' times but ... this abuse could not have occurred until Brewer was at least fifteen (Penry was subject to abuse beginning at a very young age). Although the abuse was more than an isolated incident, it does not rise to the level of that at issue in Penry.

Brewer, 442 F.3d at 279 n.16. Thus, the first basis for the Fifth Circuit's rejection of Petitioner's Penry claim what it called the "constitutional distinction' between being repeatedly beaten by one's father at age fifteen and suffering comparable abuse "at a very young age." The court added that Petitioner's child abuse evidence was distinct from Penry's because "Penry I consider[ed] the mitigation issue in light of Penry's mental retardation and child abuse, *evaluated as a single unit*." Id. (emphasis in original; citations omitted). "It is thus doubtful that Brewer's child abuse, without additional evidence of cognitive limitation, had mitigating effects sufficiently beyond the jury's reach to constitute a violation of the Eighth Amendment." Id. Citing its own pre-Smith decision in Jacobs v. Scott, 31 F.3d 1319, 1327 (5th Cir. 1994), it concluded that "evidence of a troubled childhood," having a "temporary character," can "fall sufficiently within the ambit of the [future] dangerousness

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the involuntary, court-ordered admission expired.

instruction." Id. at 280. It further found that its recent post-Smith decisions in Coble and Cole v. Dretke, 418 F.3d 494, 506-07 (5th Cir. 2005), "bolster that proposition considerably." Id. at 281.

The panel did not explain how its analysis – that all of Petitioner's evidence of mental illness and child abuse could be considered in answering the "future dangerousness" question – could be reconciled with this Court's bedrock statement in Smith that indistinguishable mitigating evidence had "little, if anything, to do with" the narrow focus of the pre-1991 special issues. Smith, 543 U.S. at 48. Nor did it take account of any of the context of the proceedings (*e.g.*, the *voir dire* or closing arguments) in assessing how the jurors would likely have understood their range of discretion in answering the special issues.

REASONS THE COURT SHOULD GRANT REVIEW

I. THE FIFTH CIRCUIT, THOUGH REPEATEDLY ACKNOWLEDGING THAT ITS OWN DETERMINEDLY NARROW READING OF PENRY CONFLICTS WITH THIS COURT'S EXPLICIT EMBRACE OF A BROADER VIEW IN PENRY II AND SMITH V. TEXAS, HAS REFUSED TO YIELD TO THE LETTER OR THE SPIRIT OF THIS COURT'S DECISIONS.

Since 2001, this Court has issued three decisions addressing as-applied challenges to the pre-1991 Texas capital sentencing statute: Penry v. Johnson, 532 U.S. 782, 797 (2001) ("Penry II"), Tennard, and Smith v. Texas, 543 U.S. 37 (2004) (*per curiam*). Taken together, these three decisions provide detailed doctrinal and practical guidance regarding the Eighth Amendment guarantee of individualized sentencing in the context of that statute. First, the Court twice described the test to be applied: a capital sentencing jury's instructions are "constitutionally inadequate" unless they "allow the jury to give *full* consideration and *full* effect to mitigating circumstances in choosing the defendant's appropriate sentence." Smith, 543 U.S. at 38 (emphasis in original) (citing Penry II,

532 U.S. at 797).[3] Second, the Court modeled the application of that test in a case involving a nineteen-year-old defendant with potentially organic learning disabilities and speech handicaps, an IQ of 78 and a history of special education classes, "exemplary" behavior in school despite the low IQ and learning disabilities, and a drug-addicted father who was involved with gang violence and stole from the family to buy drugs. *See* Smith, 543 U.S. at 41. As this Court explained, the bare "deliberateness" and "future dangerousness" questions of the former Texas statute were inadequate to permit the jury to give "*full* effect" to such mitigating evidence because the jury's consideration of that evidence was "tied to findings of deliberateness and future dangerousness that had had little, if anything, to do with the mitigation evidence petitioner presented." Id. at 48. Smith thus provided a sensible analysis for determining when the former Texas statute required supplemental instructions to satisfy Penry I. This Court issued its opinion in Smith in November, 2004.

Since then, however, the Fifth Circuit has consistently and repeatedly challenged whether this Court meant what it straightforwardly said in Smith. In its very first opinion citing Smith, written only a few weeks after that opinion was handed down, the Fifth Circuit implicitly acknowledged the likelihood that its own caselaw narrowly interpreting Penry I did not survive Smith – but turned the tables by suggesting that it was up to *this Court* to make yet another statement of its intent to adopt a broad reading of Penry I:

> Any reading of Smith as not being limited to mental impairment but rather reaching all types of mitigating evidence ... is inconsistent with [Jurek v. Texas, 428 U.S. 262

[3] Between Penry II and Smith, this Court decided Tennard; although the "*full* effect" language does not appear in the majority opinion in Tennard, the late Chief Justice Rehnquist's *dissenting* opinion in Tennard is premised on the theory that permitting jurors to give "some effect" to mitigating evidence would satisfy the Eighth Amendment. *See Tennard*, 542 U.S. at 290-92 (Rehnquist, C.J., dissenting). Tennard thus stands firmly in line with Penry II and Smith in rejecting anything less than "*full* consideration and *full* effect."

(1976); Graham v. Collins, 506 U.S 461 (1993); and Johnson v. Texas, 509 U.S. 350 (1993)]. We are not persuaded that the Court intended to undercut Jurek, Graham, and Johnson without even citing them. Whether Tennard or Smith sweep so broadly as to create a conflict with its own Jurek or Graham decisions is for the Supreme Court.

In re Kunkle, 398 F.3d 683, 685 (5th Cir. 2005). Contrary to this reasoning, this Court's decision in Smith could not fairly be read as "limited to [mitigating evidence of] mental impairment" or as preserving prior Fifth Circuit doctrine restricting the scope of Penry. First, in reversing Smith's death sentence, this Court made no suggestion that Smith's mental impairment was uniquely relevant to the outcome. Second, this Court referred to the totality of Smith's mitigating evidence when it declared that the inquiries of the special issues had "little, if anything, to do with" his evidence. Smith, 543 U.S. at 48. Finally, this Court did not fail to cite Johnson in clarifying its limited reach; instead, both Penry II and Smith invoke the "*full* consideration and *full* effect" standard set forth in Justice O'Connor's **dissenting** opinion in Johnson.

A few months later, the Fifth Circuit more openly acknowledged its ongoing struggle to reconcile its own narrow reading of Penry I with the evident import of Penry II and Smith. In R.G. Smith v. Dretke, 422 F.3d 269 (5th Cir. 2005), the court below weighed whether to grant a COA on a Penry claim premised on mitigating evidence of "an impoverished background, growing up in a crime-infested environment and alcohol abuse," given "this Circuit's prior jurisprudence [holding that such evidence] can all be given effect through both the deliberateness and future dangerousness special issue questions." R.G. Smith, 422 F.3d at 285-86. Even as it reluctantly granted COA, the Fifth Circuit warned that Kunkle was "another hurdle" to relief on the merits (*i.e.*, "another hurdle" in addition to the Fifth Circuit's own pre-Smith caselaw), pointing out that Kunkle's reasoning would require evidence of mental impairment. Id. at 287. At the same time, however, the R.G.

Smith panel conceded that this limitation was "the exact opposite" of what this Court said in Smith:

> We note that the Supreme Court has never explicitly stated that Penry claims cannot be extended beyond claims involving evidence of "mental impairment." In fact at times, it seems the Court has said the exact opposite. For example, in Smith v. Texas, the defendant put forward evidence of (1) organic learning disabilities and speech handicaps; (2) verbal IQ score of 75 and a full IQ score of 78; (3) his exemplary behavior at school despite his learning disabilities; (4) the involvement of his father with drugs and gang violence; and (5) Smith's young age of nineteen at the time he committed the crime. In granting his Penry claim, the Supreme Court did not in any way highlight any particular piece of Smith's evidence. The only mention the Smith Court made of whether the defendant's evidence was outside the reach of the special issue questions was the Court's single sentence that "[j]ust as in Penry II, petitioner's jury was required by law to answer a verdict form that made no mention whatsoever of mitigation evidence. And just as in Penry II, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented."

Id. at 287 n.8 (citation omitted). Having acknowledged the tension between the Fifth Circuit's own decisions and this Court's, however, the R.G. Smith panel went no further towards resolving it.

In a third decision, handed down on March 1 of this year, the Fifth Circuit again conceded that "tension" exists between the "some effect" standard consistently applied in its own decisions and the emphatic "*full* consideration and *full* effect" standard declared by Penry II and Smith. This Court had remanded Tennard v. Dretke after concluding that the Fifth Circuit erred in relying on its baseless "constitutional relevance" doctrine to deny COA on Tennard's Penry I claim. On remand, the Fifth Circuit first traced the history of this Court's treatment of challenges to the former Texas capital sentencing scheme. *See* Tennard v. Dretke, 442 F.3d 240, 246-252 (5th Cir. 2006). It then acknowledged that this Court's unmistakably clear language in Smith is "in tension with ... Graham and Johnson:"

> In Smith v. Texas, the Court indicated that capital sentencing procedures are constitutionally infirm whenever they do 'not allow the jury to give "*full* consideration and *full* effect to mitigating circumstances" in choosing the defendant's

> appropriate sentence.' . . . This language, which originated in Justice O'Connor's Johnson v. Texas dissent, may be in tension with Jurek and its progeny, particularly Graham and Johnson.

Id. at 253 n.17 (citations omitted). As it had in R.G. Smith, however, the Fifth Circuit in Tennard discounted the need to resolve that tension, breezily announcing that it would "leave it to other[s] to tidy the High Court's Augean stables." Id.

It is plain that Kunkle's bold challenge to this Court's decision in Smith, though technically *dicta*[4], presaged what has become the Fifth Circuit's refusal to embrace the reading of Penry articulated in Smith. The Fifth Circuit now essentially acknowledges that to the extent this Court demands that jury instructions permit *all* mitigating evidence to be given "*full* consideration and *full* effect," in the plain language of Penry II and Smith, such a requirement represents "the exact opposite" of the Fifth Circuit's own view, which insists on the primacy of Johnson and endorses instructions so long as they do not altogether *prevent* evidence from being taken into account, however tangentially. In no case, however, has the Fifth Circuit confronted the implications of the fact that both Penry II and Smith cite Justice O'Connor's dissenting opinion in Johnson as stating the standard for assessing whether jury instructions permit robust individualized consideration of a defendant's proffered mitigating circumstances.

Moreover, the Texas Court of Criminal Appeals ("CCA"), has stated that it, too, is "uncertain as to the Supreme Court's current Penry II jurisprudence." *Ex parte* Smith, 185 S.W.3d 455 (Tex.

[4] Kunkle involved a successive application for federal habeas relief. Thus, the key question for the Fifth Circuit was whether Tennard and/or Smith announced a "previously unavailable" rule of law retroactively applicable on collateral review. *See* 28 U.S.C. § 2244(b)(2). The court answered this question in the negative. Kunkle, 398 F.3d at 684-85. It proceeded to discuss the merits of Kunkle's Penry I claim in an alternative holding, where it expressed the view that a literal reading of Smith would collide with Jurek, Graham, and Johnson.

Crim. App. 2006) (denying Penry relief on remand from this Court). The CCA recognizes that "numerous post-Smith, post-Tennard Fifth Circuit cases have held that mitigating evidence [like that at issue in Smith] is fully encompassed by the Texas 'future dangerousness' or 'deliberation' special issues." Id. at 466 and n.35. This Court should grant review in Petitioner's case to conclusively resolve the "uncertainty" that troubles the CCA, as well as the "tension" the Fifth Circuit concedes to exist between its cases and this Court's most recent opinions interpreting Penry.

Despite the clarity of the guidance this Court has previously provided the Fifth Circuit and the Texas courts on comparable questions, this Court's intervention is once again necessary to resolve once and for all the enduring confusion in the courts below regarding the scope of Penry. The Fifth Circuit, while acknowledging that "tension" exists between its own decisions and those of this Court, refuses to abandon its own pre-Penry II, pre-Smith caselaw. Absent correction, the Fifth Circuit will evidently continue to maintain that jurors limited to answering whether a killing was "deliberate" and whether the defendant might be dangerous in the future could somehow express in those answers their reasoned moral response to mitigating evidence like Petitioner's history of a destructive family background, the severe emotional and psychological scars he suffered as a result, and his neurological dysfunction and impaired impulse control. That reasoning is squarely irreconcilable with Smith, and this Court should grant review and say so.

A. IN A STRING OF RECENT DECISIONS INCLUDING PETITIONER'S CASE, THE FIFTH CIRCUIT HAS REFUSED TO ACKNOWLEDGE OR FOLLOW THIS COURT'S PRONOUNCEMENT IN SMITH THAT EVIDENCE OF CHILDHOOD ABUSE AND MISTREATMENT, LIKE THAT PRESENTED BY PETITIONER, "HAS LITTLE, IF ANYTHING, TO DO WITH" THE FORMER TEXAS SPECIAL ISSUES AND THUS REQUIRES ADDITIONAL INSTRUCTIONS BEYOND THOSE NARROW INQUIRIES.

As noted, Petitioner presented extensive evidence that he was "emotionally and physically abused by his father," including being "hit ... numerous times with items such as the butt of a pistol, a flashlight, and his [father's] fists," and being warned that his father would kill him if he ever dared to fight back. Appendix B at *1. It is well-settled that this evidence could reasonably serve as the basis for a life sentence. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (defendant's "turbulent family history" was "relevant mitigating evidence"); Penry I, 492 U.S. at 322 (defendant's abused childhood bore mitigating relevance to his moral culpability). More important, this Court confirmed in Smith that such evidence about the deprived circumstances of a defendant's background "*has little, if anything, to do with*" the deliberateness of the crime *or* the likelihood that the defendant poses a "continuing threat to society." Smith, 543 U.S. at 48 (emphasis added). For that reason, its mitigating value falls "beyond the scope" of those questions, requiring additional instructions to place the evidence fully within the jury's reach. *See* Penry I 492 U.S. at 321-22.

Not only do the relevant mitigating qualities of such evidence "have little ... to do with" the probability that the defendant will be dangerous in the future, but evidence that a defendant was physically and psychologically abused as a child generally bears an *aggravating* relationship to his prospects for non-violent behavior in the future. Common sense teaches that an adult who spent his

childhood or adolescence in such a destructive environment may well lack the self-control and judgment to avoid acting out violently. *See* Penry I, 492 U.S. at 323. As a result, in the eyes of jurors shackled to the future dangerousness question, "child abuse serves as an aggravating, rather than mitigating, factor." Robertson v. Cockrell, 325 F.3d 243, 278 (5th Cir. 2003) (*en banc*) (Dennis, J., dissenting) (footnote omitted). In his dissent, Judge Dennis observed that:

> ...Chief Justice Rehnquist noted in a different context in Santosky v. Kramer, 455 U.S. 745, 789 (1982) (Rehnquist, J., dissenting), "[i]t requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens." Given such common knowledge of the greater likelihood of recidivism among abused children, the Texas special issues leaves a jury with no room to register its conclusion that while a defendant is a future threat to society, his abuse as a child reduces his responsibility for that threat, making use of the death penalty inappropriate.

Id.

Prior to this Court's decisions in Tennard and Smith, the Fifth Circuit generally denied Penry I claims premised on evidence of a troubled childhood background by applying its "constitutional relevance" screening test, which such evidence invariably failed – either because it was regarded as insufficiently "severe," or because it had no explicit causal "nexus" with the crime. On those occasions when the Fifth Circuit addressed the capacity of the pre-1991 special issues to afford such evidence meaningful consideration as mitigating, it simply asserted, without explanation, that evidence of such trauma could be considered *as mitigating* under the "future dangerousness" question. *See, e.g.*, Robertson, 325 F.3d at 253 (finding that "the statutory special issues were adequate to allow the jury to effectuate the mitigating potential of" the defendant's "sketchy evidence of beatings" by his father); *see also* id. at 249-250 n.7 (citing numerous cases where "childhood abuse was proffered as mitigating evidence" and the Fifth Circuit denied Penry relief).

Even after Penry I, in which this Court found that evidence of childhood abuse could not be given mitigating consideration within the scope of the pre-1991 special issues, the Fifth Circuit's argument that evidence of childhood trauma could support a "no" answer to the future dangerousness question was logically indefensible. But after Smith, in which this Court found the pre-1991 special issues constitutionally deficient as applied *specifically* to evidence of a deprived childhood background, and explicitly held that the mitigating qualities of such evidence were *not relevant* to either the "deliberateness" or "future dangerousness" issues, it is remarkable that the Fifth Circuit has continued steadfastly to maintain, in effect, that this Court must have been mistaken.

First, of course, the Fifth Circuit found in Petitioner's own case that his evidence of having suffered physical and psychological abuse as a child was immaterial because, in the court's view, it was not as severe as Penry's. As the court below explained,

> ... [There is] a constitutional distinction between, on the one hand, "severe" abuse of the type Penry sustained and, on the other, a "mere" troubled childhood .... There is no easy way to locate Brewer at either pole. ... [T]he trial evidence indicates that Brewer's father hit Brewer 'numerous' times but ... this abuse could not have occurred until Brewer was at least fifteen (Penry was subject to abuse beginning at a very young age). Although the abuse was more than an isolated incident, it does not rise to the level of that at issue in Penry.

Brewer, 442 F.3d at 279 n.16. Thus, the first basis for the Fifth Circuit's rejection of Petitioner's Penry claim was that being repeatedly beaten by one's father at age fifteen is less "severe" than (*i.e.*, "does not rise to the level of") suffering comparable abuse "at a very young age," a difference the court below characterized as a "constitutional distinction." The court went on to add that Brewer's child abuse evidence was distinct from Penry's because "Penry I considers the mitigation issue in light of Penry's mental retardation and child abuse, *evaluated as a single unit*." Id. (emphasis in original; citations omitted). "It is thus doubtful that Brewer's child abuse, without additional

evidence of cognitive limitation, had mitigating effects sufficiently beyond the jury's reach to constitute a violation of the Eighth Amendment." Id. Citing its own pre-Smith decision in Jacobs v. Scott, 31 F.3d 1319, 1327 (5th Cir. 1994), it concluded that "evidence of a troubled childhood," having a "temporary character," can "fall sufficiently within the ambit of the [future] dangerousness instruction." Id. at 280. It further found that its post-Smith decisions in Cole and Coble "bolster that proposition considerably." Id. at 281.

Petitioner's case is no isolated anomaly. Since Tennard and Smith, the Fifth Circuit has repeatedly considered Penry claims involving comparable evidence of an abused, traumatic or deprived background. Each time, it has concluded that, notwithstanding Smith, the jury could give such evidence full mitigating effect in deciding whether the defendant posed a "future danger" – and has consistently cited the logic of its own pre-Smith opinions in support of that holding. *See, e.g.*, Newton v. Dretke, 371 F.3d 250, 256-57 (5th Cir. 2004) (evidence of defendant's difficult background was within the scope of the pre-1991 special issues) (citing James v. Collins, 987 F.2d 1116, 1121-22 (5th Cir. 1993) (evidence of, *inter alia*, "impoverished and abusive family history" could be adequately considered by jury under special issues)); Cole v. Dretke, 418 F.3d 494, 506-07 (5th Cir. 2006) (because defendant's background of abandonment, neglect, and deprivation "did not suggest that he was unable to learn from his mistakes," it was not likely to have been viewed by the jury "as an aggravating factor *only*," and thus Penry was not implicated because "the jury could have considered Cole's family background ... under – at the least – the future dangerousness special issue") (emphasis added); Coble v. Dretke, 444 F.3d 345, 362-63 (5th Cir. 2006) (citing Jacobs v. Scott, 31 F.3d 1319 (5th Cir. 1994) to "reject [the] contention that the Texas special issues did not provide an adequate vehicle for the jury to make a reasoned moral response to Coble's mitigating

evidence of his troubled childhood"). Indeed, the Fifth Circuit now regards this conclusion as so self-evident that it no longer requires *any* citation to authority. *See* Draughon v. Dretke, 427 F.3d 286, 297-98 (5th Cir. 2005) (in response to defendant's "claim that the jury could not give effect to his evidence of abuse as a child and 'dysfunctional upbringing' in violation of Penry," stating only that "under controlling precedent [the claim] is lacking in merit. The jury could have given [the evidence] effect under the future dangerousness special issue.").

Leaving aside the fact that this reasoning is irreconcilable with the facts and the outcome of Smith, the Fifth Circuit's analysis fails to enforce a "fair reading" of Penry I as required by Johnson itself, the case upon which the court below purports to base its narrow interpretation of Penry I. Johnson emphasizes that the jury must have a "meaningful basis to consider the relevant mitigating qualities" of the defendant's evidence. 509 U.S. at 369. Because the "signature qualities of youth are transient," the future dangerousness question presented a "meaningful basis" for the jury to consider the fact of Johnson's youth. 509 U.S. at 368-69. Johnson does not imply, much less hold, that evidence of childhood physical and psychological abuse like Petitioner's would fall outside Penry I's ambit. Instead, the evident implication of Johnson is that in Penry I the "relevant mitigating qualities" of Penry's evidence of childhood trauma (and thus of Petitioner's experience of physical and emotional abuse in his early teens) found no reliable expression in the jury's answers to the special issues.

In short, the relevant mitigating quality of Petitioner's childhood abuse and mistreatment is *not* that there exists some remote possibility that the destructive psychological and emotional consequences of those life experiences might eventually abate. Instead, the relevant mitigating dimension of Petitioner's traumatic background is that, by virtue of its influence on his behavior and

judgment at the time of the crime, it significantly diminishes his moral culpability. *Cf.* Penry I. That jurors must be afforded an adequate vehicle for responding to *this* aspect of a defendant's mitigating evidence is precisely what it means to insist on instructions that permit the jury to give "*full* consideration and *full* effect" to such evidence "in choosing [the] appropriate sentence." Smith, 543 U.S. at 38. The Fifth Circuit's treatment of Penry claims based on childhood abuse, deprivation and trauma is hopelessly in conflict with Smith. Moreover, its casual dismissal of Petitioner's experience of abuse as insufficiently "severe" to raise concerns under Penry is precisely what this Court criticized in Tennard when it warned against attempts to limit mitigating circumstances to "only those features and circumstances that a panel of federal appellate judges deems to be 'severe' (let alone 'uniquely severe')." Tennard, 542 U.S. at 287.

The tension between the Fifth Circuit's begrudging view of the mitigating significance of childhood mistreatment and this Court's contrary view is further exacerbated by Williams v. Taylor, 529 U.S. 362 (2000). In addressing whether Williams suffered prejudice from his counsel's failure to develop evidence of his abused background, this Court conceded that such evidence "may not have overcome a finding of future dangerousness." 529 U.S. at 398. But the Court nonetheless found prejudice because a "description of Williams' childhood, filled with abuse and privation" could "well have influenced the jury's appraisal of his moral culpability." This conclusion necessarily entails the conclusion that evidence of childhood deprivation possesses mitigating significance *independent of its relationship to the defendant's likely future dangerousness*. Hence, jurors limited exclusively to assessing dangerousness cannot give "*full* consideration and *full* effect" to such evidence.

This Court should grant *certiorari* in Petitioner's case to examine the Fifth Circuit's

treatment of this issue.

B. THE FIFTH CIRCUIT'S POST-SMITH PRACTICE OF REFLEXIVELY CHARACTERIZING MENTAL DISORDERS LIKE PETITIONER'S AS "NON-PERMANENT" – AND THUS ALLEGEDLY MITIGATING UNDER THE "FUTURE DANGEROUSNESS" INQUIRY – SIMPLY RESURRECTS AS A *PER SE* BAR TO PENRY RELIEF THE "SEVERITY" SCREENING TEST THIS COURT EXPLICITLY REJECTED IN TENNARD.

Petitioner, like Penry, presented evidence that he suffers from a mental disorder. In Petitioner's case, that mental illness is clinical depression, for which he was involuntarily committed to a mental hospital three months before trial. *See* Appendix B at *2. Other evidence indicated as well that Petitioner was psychologically dominated and controlled by a romantic partner who was his co-defendant in the instant capital offense. Id.

The Fifth Circuit found that Petitioner's evidence of mental illness was within the jury's "effective reach" under the "future dangerousness" question, applying a *per se* rule distinguishing chronic or permanent mental disorders (such as, *e.g.*, mental retardation) from any other type or manifestation of mental illness. Brewer, 442 F.3d at 280 ("This circuit has made a distinction between mental retardation and mental illness. [M]ental illness ... does not require any adjustment to the standard two-pronged interrogatory, and we have rejected habeas petitions on these grounds on other occasions. The only instances in which mental illness has given rise to Penry I violations involve those where the illness in question is chronic and/or immutable") (footnotes omitted). Since Petitioner's mental disorder was non-permanent, the future dangerousness issue was an adequate vehicle for the jury to give it "sufficient" mitigating consideration and effect. Id. at 278-79.[5] As in

[5] This conclusion was consistent with the court's view that Smith's mandate that instructions permit jurors to give "*full* consideration and *full* effect" to mitigating evidence was simply a matter of

other post-Smith decisions, the Fifth Circuit supported this conclusion with citations to its pre-Smith opinions in Lucas and Robison. Id. at 280 n.17 & n.18.

The Fifth Circuit has offered variations on the same *per se* rationale – identifying a defendant's mental disorder as "non-severe" or "non-permanent," and then asserting that *any* such condition can by definition be given mitigating effect under the "future dangerousness" question – repeatedly in the wake of Smith. For example, the defendant in Coble, *supra*, presented expert testimony that he suffered from "two psychiatric disorders: post-traumatic stress disorder, brought about by his Vietnam experiences, and a bipolar disorder." Coble, 444 F.3d at 359. Coble's experts conceded that his mental disorders "would make him a continuing threat," but some testimony also indicated that Coble "would be less likely to be violent if he took medication." Id. at 359-360. Citing the same pre-Smith cases cited in denying relief to Petitioner, the Fifth Circuit concluded based on that testimony that "Coble's mitigating evidence demonstrated that his mental illness was treatable, thus placing it within the effective reach of the sentencer" under the "future dangerousness" question, as "[t]his Circuit has previously held." Id. at 361 (citing Lucas and Robison). Similarly, the defendant in Cole presented mitigating evidence that he suffered from "organic neurological deficiency." In that case, the court below asserted that even such an apparently longstanding disability bore mitigating relevance to the "future dangerousness" inquiry. Cole, 418 F.3d at 505-08. (jurors "could have considered Cole's ... organic deficiency evidence under [the] future dangerousness special issue. Given the experts' testimony during the punishment phase, the jury could have [found] that, although Cole ... may suffer from diminished impulse control, he is

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"semantics." "Even if the requirement is called 'full,' it means nothing more than 'sufficient.'" Id. at 278-79.

capable of change and thus would not necessarily remain a danger in the future").

These cases well illustrate the Fifth Circuit's *per se* rule, to which it clings notwithstanding Smith, that any "non-severe" or "non-permanent" mental disorder is unproblematic under Penry I. That inflexible rule amounts to an attempt to resurrect the threshold screening test this Court rejected out of hand in Tennard. Where, prior to Tennard, the Fifth Circuit reflexively dismissed any non-permanent condition by holding, "Any mental disorder that is not chronic or permanent is not 'constitutionally relevant mitigating evidence,'" it now reflexively dismisses the same evidence by holding, "Any mental disorder that is not chronic or permanent can support a 'no' answer to the 'future dangerousness question, so no additional instructions are necessary." This *per se* rule is nothing more than the now-discredited "uniquely severe permanent handicap" standard by another name. Tennard makes clear that a court reviewing for Penry I error should not assess the "permanence" or "severity" of the condition the defendant asserts as mitigating, but instead ask whether the jury could have expressed its reasoned moral response to the relevant mitigating qualities of that evidence in answering the special issues. Tennard, 542 U.S. at 287-89.

The Fifth Circuit's analysis fails profoundly to appreciate what is actually *mitigating* about a defendant's underlying mental disorder – *i.e.*, its effect on the defendant's moral culpability for the crime. *That* aspect of the underlying mental disorder is not captured in any way by the fact that there may exist some remote possibility that the disorder, as the years pass, may become less severe, or interfere less with the defendant's functioning in the world. Contrary to the Fifth Circuit's reasoning, the potential mitigating significance of Petitioner's clinical depression is not reduced by the fact that he suffered only a "single episode" rather than repeated episodes, or the fact that his depression manifested itself "without psychotic features." Brewer, 442 F.3d at 275 n.1. None of

these aspects of the "severity" of Petitioner's mental disorder placed the relevant mitigating qualities of that condition within the reach of jurors permitted to answer only whether Petitioner would be dangerous in the future.

Contrary to the Fifth Circuit's view, even if a juror believed that Petitioner would never again suffer an episode of clinical depression, that did not transform the "future dangerousness" inquiry into an adequate vehicle for the jury to give effect to its reasoned moral response to the evidence of Petitioner's mental disorder. If a juror concluded that Petitioner's mental disorder was acting on him at the time of the crime and thereby reduced his moral culpability, but *also* concluded based on the evidence as a whole that Petitioner might well act out violently in the future, regardless of whether he suffered additional bouts of clinical depression, she would have no vehicle for expressing the conclusion that a sentence less than death was warranted. The jury charge did not permit a juror to express the reasoned moral judgment that, because of Petitioner's mental disorder, a life sentence was appropriate even though Petitioner was likely to remain a "continuing threat to society."

The Fifth Circuit errs in the view that allowing jurors to consider and give effect to the "non-permanent" nature of a serious mental disorder is an acceptable substitute for allowing them directly to consider and give effect to its actual consequences for an offender's moral culpability. While the transience or amenability to treatment of a particular mental disorder might make it *less aggravating* under the future dangerousness question, this Court's cases demand that the jury be provided a vehicle for considering such evidence *as mitigating* – not simply as "potentially somewhat less aggravating." This Court should grant *certiorari* to consider whether the Fifth Circuit's imposition of strict "severity" and "permanence" requirements for Penry relief in cases presenting evidence of mental disorder can be sustained in light of Tennard and Smith.

C. THE FIFTH CIRCUIT'S PENRY ANALYSIS FAILED TO GIVE DUE REGARD TO THE FACT THAT HERE, AS IN MANY CASES TRIED UNDER THE PRE-1991 SENTENCING STATUTE, PROSECUTORS REPEATEDLY SOUGHT TO EXPLOIT THE NARROW SCOPE OF THE FORMER SPECIAL ISSUES AND REMIND JURORS THAT THEY WERE DUTY-BOUND TO ANSWER THOSE ISSUES ON THEIR OWN TERMS AND NOT TO ACHIEVE A JUST RESULT IN LIGHT OF PETITIONER'S MITIGATING EVIDENCE.

This Court has acknowledged that the context of the proceedings is relevant in determining whether a jury could reasonably have given effect to the defendant's mitigating evidence under its instructions. Boyde v. California, 494 U.S. 370, 383 (1990); Penry, 532 U.S. at 800-02 ("[W]e will approach jury instructions in the same way a jury would – with a commonsense understanding of the instructions in the light of all that has taken place at trial.") (internal quotations omitted). Another vice of the Fifth Circuit's post-Smith treatment of Penry claims is that the court never examines either the arguments of counsel or the information provided to jurors during *voir dire* as a source for illuminating how the jurors may have understood the pre-1991 special issues to limit their sentencing discretion. The record of Petitioner's case is representative in this regard; both at *voir dire* and at closing argument, the prosecutors took advantage of the textual narrowness of the special issues and the jurors' oath to answer them according to the evidence – yet the Fifth Circuit failed to acknowledge, much less engage, those important facts in determining whether Penry was violated.

During *voir dire*, the prosecutor repeatedly emphasized to prospective jurors that they would have *no discretion* in assessing punishment, but instead would be duty-bound to answer the special issues according to the evidence. This exchange with juror Robertson is representative:

> You know, our laws basically say that in a capital murder case, a jury must answer certain questions at the punishment phase, and depending on how those questions are answered, it may fall upon – well, it does. The law basically says that the Judge, not the jury, assesses the punishment in a capital murder case. So it's not a situation

where a jury [sic] has said, "Okay. You've heard the evidence. Now, tell us what needs to be done to this particular defendant for committing this act." It's not the way the system works.

The way the system works, the questions are submitted to the jury at the punishment phase of the trial. And again, we're assuming that there has already been a guilt or innocence hearing that the defendant has been found guilty of ... capital murder, and now we go to the punishment part. At a capital murder case, at the punishment part of the trial, these questions are given to a jury and the jury is called upon to render an answer "yes" or "no" based upon the evidence. If all of the questions ... are answered "yes," then this Court is mandated by law to assess the punishment of death. . However, if any of the questions are answered "no" by at least ten jurors, then this Court also is mandated according to the law to assess the punishment of life imprisonment.

So you can see automatically that there's not any discretion from the standpoint of the Judge because it depends on how those questions are answered. [W]hen we go over the questions themselves, you'll see that *there's not a lot of discretion that's really allowed to a jury* because they pertain to evidence that you're going to hear at the guilt or innocence part of the trial, and also at the punishment part of the trial. And they're going to really place you in the position of answering them "yes" or "no," depending upon what you think the proper answer is according to the evidence you hear. ...

RR XIII at 1969-70 (emphasis added). After reviewing the text of the special issue questions with juror Robertson, the prosecutor continued:

Do you feel that as a juror *you would be able to answer those questions ... "yes" or "no" depending upon the evidence that you heard during the trial without regard to the sentence that the Judge must impose* according to the law? ... In other words, as a juror, you have to look at the evidence and answer the questions "yes" or "no." And I will submit to you that for the State and for the Defendant to receive a fair trial, you have to answer those according to ... the evidence submitted, without regard to the punishment that this Court must assess. It's very important that jurors be able to do that because *their job is not to determine whether a person goes to the penitentiary for life imprisonment or whether the person should be executed according to the laws of this State. What's important is that the jury look at the evidence and answer those questions "yes" or "no" based solely upon the evidence* that they hear in this courtroom.

Id. at 1972-73 (emphases added).

This theme – that the jurors were bound by their oaths to answer the special issues according to the evidence, and that they were not authorized by their instructions to choose an appropriate sentence according to their assessment of the defendant's culpability, was persistently rehearsed by the prosecutor with juror after juror. *See, e.g.*, RR X at 1449 (prosecutor to juror Needham: "I think when you look at these ... questions that are submitted, you're going to find that there's *not a lot of discretion, that those questions should be answered, not to determine what punishment should be inflicted, but should be answered according to the evidence*") (emphasis added); RR XII at 1853 (prosecutor to juror Stephen: "Our law says the jurors can't do that [answer the special issues to ensure a particular sentence is imposed]. Our law says that the jury has to answer those questions according to the evidence. And basically, the law requires a juror be able to answer those without considering what the result of the answers may be;" elicits juror's agreement to "answer those questions ... according to the evidence, without regard to the punishment that this Court must assess"); RR XI at1652 (prosecutor to juror Stafford: "The laws of this State require that *if you feel that life imprisonment is a proper form of punishment, you set that feeling aside and render your decision according to those answers [sic] the way they should be answered under the evidence that you hear* and under the laws of this state") (emphasis added); RR VI at 624 (prosecutor to juror Ambers: *"[Y]ou don't have any discretion from the standpoint of what punishment is assessed,* ...this Court has no discretion at what punishment is assessed. You can see very easily that the way these questions are answered determines what punishment is going to be applied according to the law") (emphasis added), 626 (prosecutor to juror Ambers: "[T]his is what it really gets down to, I guess, with all the talking we've done: As a juror, our law says that you must render a decision according to the law of this State and according to the evidence that you hear. Would you be the

kind of juror that could answer those questions according to the evidence without considering what effect and what the law of this State may require this Judge to do as far as the punishment?"); RR VIII at 1091 (prosecutor to juror White: "So you can see that the ultimate decision about what punishment is to be assessed really lies within the laws of the State because the Judge doesn't have any discretion in the punishment. And, of course, the jury is going to be answering questions about the evidence itself. Now, do you feel that you would be able to answer the questions that are submitted to you at the punishment phase of the trial without considering what punishment this Court must assess according to the law?").

All these statements by the prosecutor at *voir dire* are relevant to any claim – such as that made by the court below in denying relief – that the jurors in Petitioner's case understood themselves to be authorized to express their "reasoned moral response" to Petitioner's mental illness and child abuse in answering the "future dangerousness" question, as opposed to simply answering that question directly "according to the evidence." Yet, the Fifth Circuit never even considered whether the record supported such an inference. Plainly, it does not.

Nor did the court below acknowledge that the inadequacy of the pre-1991 special issues as applied to Petitioner's mitigating evidence was apparent from the closing arguments at punishment. From the Fifth Circuit's holding – that jurors doubtless understood that Petitioner's background of physical and psychological abuse and his mental illness could support a "no" answer to the "future dangerousness" question – one would expect to see *some* version of that argument offered by defense counsel. But Petitioner's trial counsel never argued that Petitioner's mitigating evidence logically supported a negative answer to the "future dangerousness" question. Instead, after reviewing the various pieces of evidence presented by the State in support of a finding of "future dangerousness,"

defense counsel simply said, "I'm fixing to sit down now, but I want you to realize that this is what we're here for. *You're determining what to do about Brent* in answering those special issues." RR XIX at 885 (emphasis added). In the same vein, Penry's defense counsel initially urged the jury to answer the first special issue "no" because "it would be the just answer, and [a] proper answer." Penry I, 492 U.S. at 325. Ultimately, counsel in both cases were reduced to making arguments that did not attempt to help the jurors reason meaningfully from the nature of the mitigating evidence to a negative finding on the "future dangerousness" question, but for all practical purposes simply pleaded for nullification.

Nor did the Fifth Circuit, in rejecting Petitioner's Penry claim, attend to the prosecutor's arguments. Here, just as in Penry I and Smith, the prosecutor responded to defense counsel's plea for mercy by demanding that jurors honor their oath to answer the special issues honestly according to the evidence, or else deny all parties "a fair trial:"

> Contrary to what [defense counsel] would have you believe, I don't have the power to say whether he lives or dies. *You don't have the power to say whether he lives or dies. You answer the questions according to the evidence, [j]ust like you did at the guilt or innocence. That's all.* It's not a matter of life or death. It's whether it was deliberate. Was this act deliberate? Will he continue to commit violent acts? That's all you answer. And every one of you people told me you would base that not on the result, but upon what the evidence dictates you must do. If you do that and he gets life, a fair trial is had. If you do that and he dies tomorrow, a fair trial was held. You have to do your job. I have to do mine. And these people have to do theirs. And if everyone does their job, a fair trial results.

RR XIX at 894-95 (emphasis added). The prosecutor also argued that even if Petitioner's background had resulted in his being dangerous, his dangerousness was all that mattered:

> And, you know, folks, you can take a puppy, and you can beat that puppy and you can make him mean, but if that dog bites, he is going to bite the rest of his life, for whatever reason. *Whatever got him to this point, he is what he is today. And that will never change.* That will never change.

RR XIX at 898 (emphasis added).

This Court confronted a very similar argument in Tennard, finding that "the jury might well have given Tennard's low IQ evidence aggravating effect in considering his future dangerousness, not only as a matter of probable inference from the evidence but also because the prosecutor told them to do so: '[W]hether he has a low IQ or not is not really the issue. Because the legislature, in asking you to address that question, the reasons why he became a danger are not really relevant. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question.'" Tennard, 542 U.S. at 288-89. The prosecutor's closing argument against Petitioner – that "[w]hatever got him to this point, he is what he is today. And that will never change" – had precisely the same impact. In both cases, "the prosecutor's comments pressed exactly the most problematic interpretation of the special issues," suggesting that the defendant's most important mitigating evidence "was irrelevant in mitigation, but relevant to the question whether he posed a future danger." Id. at 289.

The prosecutor summed up his argument with the same point he had made emphatically so many times during *voir dire*: that the jurors' sworn obligation was to answer the special issues according to the evidence, not according to what sentence they thought was appropriate in light of that evidence:

> But you go back there and look at the wounds it took to kill this man. And if you come back with an answer "no," you're not looking. It's nothing but a sympathetic verdict. You can't get more deliberate than ... that. If you feel comfortable that he will be walking in any society, in the penitentiary or anyone else, and he will not be a continuing threat to whoever is around him, that can be your decision, and you can sleep with it, and we'll live with it. *But base your decision on what's dictated according to the facts and not on what punishment must be assessed. Do what the facts say, answer the questions according to the law, and a fair trial will be held.*

RR XIX at 899-900 (emphasis added). This argument is precisely the type of entreaty this Court pointed to in Penry I and Smith as reflecting the inadequacy of the pre-1991 special issues to permit full consideration of mitigating evidence. *See* Penry I, 492 U.S. at 325 ("You've all taken an oath to follow the law and you know what the law is.... [Y]our job as jurors and your duty as jurors is not to act on your emotions, but to act [on] the evidence that you have heard in this courtroom, then answer those questions accordingly"); Smith, 543 U.S. at 48 n.5 (prosecutor argued that jurors "had promised to 'follow the law' and return a 'yes' answer to the special issues as long as the State met its burden of proof").

This Court emphatically has made clear that "nullification" is not an appropriate strategy for accommodating the Eighth Amendment requirement of individualized sentencing, even when the jury charge explicitly authorizes that response. Penry II, 532 U.S. at 790; Smith, 543 U.S. at 45-48. If anything, the unadorned pre-1991 special issues afforded Petitioner even less protection than the defendants in those cases. Absent instructions to consider Petitioner's background of abuse and his mental disorder as it bore on his moral culpability, the jurors were bound by their oaths – as the prosecutor urged – to return an affirmative answer to the second special issue.

In sum, the context of the proceedings as a whole, including *voir dire* and closing arguments as well as the evidence presented and the sentencing instructions and verdict form, argue for relief under Penry. The prosecutor understandably sought to exploit the narrow inquiry of the special issues, and defense counsel effectively asked for jury nullification in response. The Fifth Circuit, in improvising *post hoc*, counterintuitive ways in which the special issues might have been read more broadly by the jurors, ignored this vital contextual evidence in contravention of this Court's direction

in Boyde, Penry I, Penry II, and Smith. The Court should grant *certiorari* to clarify that a proper Penry analysis must take account of not only what evidence was presented, but what jurors were told (and thus likely understood) about the meaning of their instructions and the scope of their sentencing discretion.

II. LEFT UNCHECKED, THE FIFTH CIRCUIT'S APPROACH WILL RESULT IN THE EXECUTION OF SCORES OF DEFENDANTS WHO WERE DENIED MEANINGFUL CONSIDERATION OF THEIR MITIGATING EVIDENCE.

It is understandable that this Court may ask how many times it must spend its resources reviewing death sentences imposed under a capital sentencing statute that was rightly jettisoned fifteen years ago. After all, as the Court observed in Penry II, Texas fixed the constitutional flaw in its statute in 1991. Penry II, 532 U.S. at 803. Today, jurors in every Texas capital case – like those in every capital case everywhere else in the U.S. – are provided an unambiguous and appropriately broad vehicle for giving *direct* mitigating effect to evidence about the defendant's character and background. No defendants in the future will suffer Petitioner's fate of being sentenced to death at age nineteen by jurors unable to give meaningful consideration to evidence of physical and psychological abuse as a child and serious mental illness as a young adult.

Nevertheless, the size and scope of the continuing "Penry problem" warrants this Court's intervention. At oral argument in Tennard in March 2004, the Court asked how many prisoners sentenced under the pre-1991 statute remain on Texas' death row. Counsel for Respondent answered, "By my last count there are approximately 100 ... on [d]eath [r]ow in Texas who were sentenced under this [pre-1991] sentencing scheme ...." Transcript of Oral Argument, Tennard v. Dretke, 2004 WL 720119 at *43. Petitioner's counsel estimated the number at "closer to 50." Id. at

*51. Information available online from the Texas Department of Criminal Justice indicates that 65 to 70 prisoners on Texas' current death row were sentenced under the pre-1991 statute (*i.e.*, were sentenced for offenses committed prior to September 1, 1991). Regardless of which of these numbers is correct, any of them would represent a substantial proportion of Texas' death row, which is one of the largest in the Nation. Indeed, the group of Texas prisoners who stand to be affected by a decision resolving the scope of Penry is larger than the entire death rows of many States, making the issue presented by Petitioner's case not just important, but certain to recur before this Court.[6]

Finally, it should make no difference that the *en banc* Fifth Circuit is presently weighing the scope of Penry in Nelson v. Dretke, No. 02-11096. After this Court granted *certiorari* and remanded for further consideration in light of Tennard, *see* Nelson v. Dretke, 542 U.S. 934 (2004), the Fifth Circuit initially denied relief in an opinion generally indistinguishable from its other post-Smith decisions, finding that Nelson's evidence of severe borderline personality disorder and childhood deprivation and mistreatment could be given mitigating effect under the "deliberateness" and "future dangerousness" questions. *See* Nelson v. Dretke, 442 F.3d 282 (5th Cir. 2006). Two weeks later, however, rehearing *en banc* was granted *sua sponte*. Nelson v. Dretke, 442 F.3d 912 (5th Cir. 2006).

[6] Counsel is aware of at least seven other Penry cases presently pending in the Fifth Circuit alone, in addition to three in (or coming to) this Court. Those pending in the Fifth Circuit include Coble v. Dretke, No. 01-50010 (pending on petition for rehearing; *see* Coble v. Dretke, 444 F.3d 345 (5th Cir. 2006) (denying Penry claim premised on evidence of child abuse, mental disorder, and good character); Mines v. Dretke, No. 03-11137 (*see* Mines v. Dretke, 118 Fed.Appx. 806 (5th Cir. 2004) (unpublished) (granting COA on Penry claim based on evidence of episodic mental disorder)); Chambers v. Dretke, No. 03-11248 (see Chambers v. Dretke, 145 Fed.Appx. 468 (5th Cir. 2005) (unpublished) (granting COA on Penry claim based on evidence of deprived background and positive family relationships)); R.G. Smith v. Dretke, *supra*; Bower v. Dretke, No. 03-40980 (*see* Bower v. Dretke, 145 Fed.Appx. 879 (5th Cir. 2005) (denying COA on Penry claim premised on evidence of good character); Reed v. Dretke, No. 05-70046; and Garcia v. Dretke, No. 03-11097. The cases in this Court include Petitioner's case, Cole v. Dretke, *supra*; and Summers v. Dretke , No. 05-11074,

Petitioner respectfully submits that this Court should not defer action in his case in the hope that the *en banc* decision in Nelson might disavow the suffocatingly constricted reading of Penry that currently prevails in the Fifth Circuit. The Nelson panel opinion did not even produce a dissent, and no other Fifth Circuit case has taken this Court's opinion in Smith at its word. This issue is ripe for this Court's review *now*, in Petitioner's case.

III. THE FIFTH CIRCUIT'S APPROACH IN THESE CASES, LIKE ITS ARTICULATION OF THE "SEVERITY" AND "NEXUS" TESTS, THREATENS TO UNDERMINE THE ROLE OF INDIVIDUALIZED SENTENCING IN ENSURING A LINK BETWEEN MORAL CULPABILITY AND CAPITAL SENTENCING VERDICTS.

The Fifth Circuit's refusal to give Penry I a "fair reading" even after Smith and Tennard represents a continuing failure to appreciate the significance of the individualization requirement and the vital role it plays in the structure of this Court's post-Furman capital sentencing jurisprudence. As we show below, this tendency was apparent prior to Tennard in the Fifth Circuit's rigid enforcement of its screening test for "constitutionally relevant mitigating evidence." Smith, by modeling the correct Eighth Amendment approach, provided even greater guidance for the Fifth Circuit to alter its unfounded approach. But the recrudescence of the Fifth Circuit's "uniquely severe permanent handicap" test this year, in the form of categorical *per se* rules excluding entire classes of mitigating evidence from Penry's ambit because they are not as "severe" as the particular facts of Penry itself, once again demands this Court's intervention.

As is now familiar, this Court's post-Furman cases strive to minimize arbitrariness in capital sentencing by (1) narrowing the class of "death-eligible" offenses and ensuring that particular offenders are reliably determined to fall into that class, and (2) ensuring that the sentence imposed on

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as well as Laroyce Smith's own case.

a particular offender represents a "reasoned moral response" to his unique background and character and the circumstances of the offense. *See, e.g.*, Tuilaepa v. California, 512 U.S. 967, 972 (1994) (describing "eligibility" and "selection" decisions). With respect to the latter process, this Court has stated that "[w]hat is important at the selection stage is an *individualized* determination [of the appropriate sentence] on the basis of the character of the individual and the circumstances of the crime." Id.(emphasis in original; citations omitted).

In light of this longstanding emphasis on capital sentencing as an "*individualized* determination" of the appropriate sentence, perhaps the most grave problem with the Fifth Circuit's initial response to Penry was its development of a rigid "screening test" to exclude most types of evidence *ex ante* from consideration as potentially Penry-problematic. The screening test defined as "constitutionally relevant mitigating evidence" only those conditions which amounted to a "uniquely severe permanent handicap," with which the defendant was burdened through no fault of his own and which bore a causal "nexus" to the crime. *See* Tennard, 542 U.S. at 283-84. As this Court recognized in Tennard, such a "restrictive gloss" had the effect of foreclosing relief under Penry before the reviewing court even undertook any analysis of the adequacy of the pre-1991 "special issues" to accommodate the defendant's particular mitigating evidence. Id. at 286. It thereby short-circuited the process of ensuring that the jury had made an appropriately individualized judgment about the defendant's sentence.

It is now clear that in response to Tennard (and in willful ignorance of Smith), the Fifth Circuit has simply transformed its former "screening test" into a set of *per se* rules for denying Penry claims "on the merits." In every case in which the court below has refused Penry relief in the face of

mitigating evidence of childhood deprivation or abuse and/or mental disorder, it has attempted to distinguish Penry with the observation that the defendant's mitigating evidence is not as "severe" as Penry's, often by focusing on the defendant's ability to "learn from his mistakes." *See, e.g.*, Brewer, F.3d at 281 ("mental illness [is not] tantamount to mental retardation for the purposes of our [Penry] case law"), id. ("There does not appear to be one iota of evidence suggesting either that Brewer's [clinical depression] is permanent or that he experienced cognitive limitations of any sort as a result of it"); Cole, 418 F.3d at 506 ("Unlike the evidence in Penry, Cole's mitigating evidence did not suggest that he was unable to learn from his mistakes"); Coble, 444 F.3d at 362 ("Coble's evidence is distinguishable from that in Penry. The abuse suffered by Penry resulted in a mental impairment that caused Penry to be in some way unable to learn from his mistakes. It is this inability to learn from one's mistakes that suggests a 'yes' to the future dangerousness special issue and prevents the jury from being able to properly consider the defendant's abusive childhood as mitigating evidence. Coble does not argue that his troubled childhood resulted in any mental impairment that prevented him from learning from his mistakes.") (citation omitted).

This approach fails to grasp the profound importance of ensuring that every defendant sentenced under the pre-1991 statute was, *in fact*, treated individually – as the Eighth Amendment requires. As Smith emphasizes, jury instructions that afford "*full* consideration and *full* effect" to proffered mitigating evidence are important not for their own sake, but because giving the jury a direct and unambiguous vehicle for responding to mitigating evidence is essential to the task of "choosing the defendant's appropriate sentence." 543 U.S. at 38. The Fifth Circuit's mechanistic approach, under which any evidence not identical to Penry's is treated automatically as falling outside the ambit of Penry and Smith, fails to accord due regard to genuine individualization as an

indispensable feature of a constitutionally adequate capital sentencing system. *See* Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring) (Eighth Amendment "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered" by the sentencing authority at trial). The resulting systemic failure to protect the right to individualized sentencing, and thereby ensure a strong link between moral culpability and resulting sentencing verdicts, is a serious matter that warrants plenary review by this Court. *Cf.* Ring v. Arizona, 536 U.S. 584, 618 (2002) (Breyer, J., concurring) (diversity of views in the U.S. about the propriety of capital punishment "argues strongly for procedures that will help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate ....").

CONCLUSION AND PRAYER FOR RELIEF

Petitioner's sentencing hearing was marred by the same constitutional flaw as those in Penry and Smith. Jurors heard mitigating evidence about Petitioner's youth, physical and psychological abuse as a child, and serious mental illness. Individually or collectively, that evidence could well have persuaded them to spare Petitioner's life. The jurors, however, were limited to instructions that "had little, or nothing, to do with" Petitioner's mitigating evidence and thus gave them no vehicle for expressing that conclusion. This Court can have no confidence that Petitioner's death sentence represents the jury's actual conclusion that a death sentence was the *appropriate* punishment for his role in the crime. *Cf.* Smith.

This Court has explained that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." Williams, 529 U.S. at 398. Equally important, a defendant's "reduced capacity for considered choice" and his "emotional history" both "bear directly on the fundamental justice of imposing

capital punishment." Skipper v. South Carolina, 476 U.S. 1, 13-14 (1986) (Powell, J., concurring in judgment). Faithful adherence to those insights suggests the importance of reviewing – and reversing – the Fifth Circuit's decision in Petitioner's case.

For the reasons set forth above, Petitioner respectfully prays that this Court grant a writ of *certiorari* to give plenary review to the judgment below. In the alternative, if the Court elects to consider the proper scope of Penry I in another case, Petitioner prays that the Court hold his case pending that decision;[7] or summarily reverse the judgment below; or grant such other relief as justice requires.

Respectfully submitted,

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[7] We expect the coming weeks will see petitions to this Court from numerous death-sentenced Texas prisoners seeking review of Penry issues denied by the Fifth Circuit or the Texas Court of Criminal Appeals, including one (Coble) who faces an August 30 execution date.

File Date
July 17, 2006

(7)

No. 05-11287

IN THE SUPREME COURT OF THE UNITED STATES

BRENT RAY BREWER,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the lower court correctly upheld the state court's reasonable decision that Brewer's jury was not deprived of a constitutionally sufficient vehicle for considering and giving effect to his mitigating evidence.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a federal habeas corpus proceeding in which Petitioner Brent Ray Brewer[1] unsuccessfully challenged his presumptively valid state capital murder conviction and sentence of death pursuant to 28 U.S.C. § 2254. In 2004, the district court below conditionally granted the writ regarding the punishment phase of Brewer's trial, but denied relief as to all other claims. *Brewer v. Dretke,* No. 2:01-CV-112-J, 2004 WL 1732312 (N.D. Tex. 2004) (unpublished order); PA:B1-11. The Director appealed and the United States Court of Appeals for the Fifth Circuit reversed. *Id.,* 442 F.3d 273 (5th Cir. 2006); PA:A1-9. In the instant petition, Brewer claims that the court of appeals erred when it held that the state court did not unreasonably decide his mitigating evidence was within the reach of the jury in answering the former Texas special issues. However, Brewer is wrong and this Court should deny certiorari review.

STATEMENT OF THE CASE

I. Facts of the Crime

The Court of Criminal Appeals of Texas succinctly summarized the evidence proving Brewer's guilt in its direct appeal opinion:

> The evidence adduced at trial shows that on April 26, 1990[, Brewer] and Kristie Lynn Nystrom convinced the deceased to give them a ride in his truck. [Brewer] rode in the back seat. After traveling approximately one block,

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[1] Respondent Nathaniel Quarterman will be referred to as "the Director." The following abbreviations are used herein: "PA" refers to the appendices to Brewer's petition; "RR" refers to the Reporter's Record of transcribed trial proceedings; "CR" refers t to the Clerk's Record of pleadings and documents field with the court during trial; "SX" refers to the numbered exhibits offered by the State and admitted into evidence at trial; "DX" refers to the numbered exhibits offered by the defense and admitted into evidence at trial; "SHCR" and "SuppSHCR" refer to the Clerk's Record and Supplemental Record of pleadings and documents filed with the court during state habeas corpus proceedings.

> [Brewer] stabbed the deceased several times in the neck while Nystrom held the deceased's right arm to prevent him from fighting back. The deceased's jeans were pulled down over his buttocks and a blood transfer stain from his wallet was found on his underwear. Nystrom was later seen with the deceased's blood-soaked wallet and truck keys. Further, [Brewer] stated to Skee Callan [*sic*] that he had killed a man for $140 — the same amount of money that the deceased was believed to have at the time of his death. Michelle Francis, [Brewer]'s and Nystrom's roommate, testified that neither [Brewer] nor Nystrom had any money earlier that day. However, both were later able to purchase bus tickets to Dallas.

Brewer v. State, No. 71,307, slip op. at 2-3 (Tex. Crim. App. 1994) (unpublished opinion).

In addition, an FBI forensic serologist determined that DNA from blood found on the steering wheel of the victim's truck was consistent with Brewer's DNA. 16 RR 342-60; SX 1B, 31, 40, 68A, 81A. More importantly, a bloodstained butterfly knife was found just outside the front passenger door of the victim's truck. 15 RR 24, 81, 135-38, 167, 170-71; SX 1, 8-9, 30-31, 89B. DNA from blood found on the knife matched both Brewer and the victim. 16 RR 359-60; SX 31. An FBI fingerprint expert also determined that Brewer's fingerprints and palm print were found on the right rear outside door handle as well as the right rear door frame of the victim's truck. 16 RR 400-03, 419-20; SX 4, 105-08. Brewer's bloody fingerprint was also found on the butterfly knife. 16 RR 408-09; SX 1, 31. Brewer was seen after the murders with a cut on his hand. 16 SR 433-34, 440-41; 17 RR 456-57; SX 69, 85. Finally, both Brewer and Nystrom were seen soaked with blood the night of the murder. 16 RR 433-35; 17 RR 454-55.

II. Direct Appeal and Postconviction Proceedings

On direct appeal, the Court of Criminal Appeals applied the appropriate Supreme Court authority to determine "whether the [deliberateness and future-dangerousness] issues

provided a vehicle for the jury to give effect to [Brewer's mitigating] evidence."[2] *Brewer v. State*, slip op. at 13-14 (citing *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (plurality opinion), *Eddings v Oklahoma*, 455 U.S. 104 (1982), *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), and *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion)). The state court summarized Brewer's three categories of mitigating evidence as follows:

> (1) [Brewer] was not mentally retarded,[3] but was involuntarily committed on January 1, 1990, for "major depression, single episode, without psychotic features, polysubstance abuse." The examining physician based his opinion on a suicide note [Brewer] wrote to his mother. On January 25, [Brewer] signed a request for voluntary admission to Big Springs [*sic*] State Hospital for fourteen days.[4]

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[2] The trial court instructed the jury, pursuant to TEX. CODE CRIM. PROC. Art. 37.071 (West 1991), as follows:

SPECIAL ISSUE NO. 1

> Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, BRENT RAY BREWER, that caused the death of the deceased, Robert Doyle Laminack, was committed deliberately and with the reasonable expectation that the death of the deceased would result?

SPECIAL ISSUE NO. 2

> Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, BRENT RAY BREWER, would commit criminal acts of violence that would constitute a continuing threat to society?

CR 289-90. Special Issue No. 1 is referred to herein as the "deliberateness" issue, while Special Issue No. 2 is referred to as the "future-dangerousness" issue.

[3] "Brewer has a tested IQ of 115, placing him in roughly the ninety-fourth percentile of human intelligence." PA:A9 n.25; 18 RR 652.

[4] ... [Brewer] chose not to enter the records from Big Spring State Hospital into evidence. [Rather, Brewer called China Long, a justice of the peace in Howard County, Texas, to

(2) [Brewer] came from an abused background where he was ignored by both his father and step-father. He did not have a relationship or live with his real father until after he was fifteen-years old.[5] [Brewer]'s father hit him on several occasions, once with the butt of a pistol and once with a flashlight. [Brewer]'s father frequently beat his mother. [Brewer]'s father had once told him, "if you ever draw your hand back, you'd better kill me because I'll kill you."

(3) [Brewer] smoked marijuana when he was a teenager.[6]

Id. at 15. The state court concluded that the special issues provided an adequate vehicle for the jurors to give effect to Brewer's mitigating evidence. *Id.* at 15-16. This Court denied certiorari review. *Brewer v. Texas,* 514 U.S. 1020 (1995).

Brewer then obtained appointed counsel in state court and filed a habeas corpus application on April 23, 1997.[7] SHCR 15-24, 37–221. The trial court declined to hold an evidentiary hearing and, on October 20, 2000, entered findings of fact and conclusions of law recommending that relief be denied. *Id.* at 340; SuppSHCR 3-7. Thereafter, on January 31, 2001, the Court of Criminal Appeals adopted the trial court's findings and denied habeas

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testify that she signed the commitment order. 18 RR 755-59; DX 5.]

[5] [Brewer] did see his biological father when he was five months old and for a short period of time when he was five years old. There is no evidence of abuse during either of these encounters.

[6] There was also evidence Brewer was obsessed with his co-defendant and girlfriend, Nystrom, and allowed her to control him. 18 RR 791-92, 798, 816, 825-27, 838. As the court below noted, "[t]his evidence was not medical and did not go to Brewer's volition; it consists merely of lay observations that the woman was the alpha partner in the relationship." PA:A3 n.2.

[7] Brewer's initial attempt to obtain postconviction relief occurred in federal district court, where he unsuccessfully requested federal funding to exhaust his state court remedies. After the federal courts declined to intervene, the proceedings were dismissed without prejudice. *Brewer v. Johnson,* No. 96-11188 (5th Cir. 1996) (unpublished order); *Brewer v. Scott,* No. 2:95-CV-125 (N.D. Tex. 1997) (same); *Brewer v. Johnson,* 139 F.3d 491 (5th Cir. 1998).

relief. *Ex parte Brewer,* No. 46,587-01 (Tex. Crim. App. 2001) (unpublished order).

Brewer filed a habeas corpus petition in the federal district court on May 7, 2001, and the Director answered on June 28, 2001.[8] Ultimately, after the district court requested additional briefing concerning *Tennard v. Dretke,* 542 U.S. 274 (2004), relief was partially granted. PA:B3-5. As discussed *supra,* the Director appealed and the lower court reversed, holding that the state court correctly determined Brewer's mitigating evidence was *not* beyond the effective reach of the jury when it answered the former Texas special issues. PA:A5-9.

The court of appeals first noted that, "although some relevant evidence may receive constitutionally insufficient mitigating effect under the standard Texas special issues (*e.g.,* evidence of mental retardation), other evidence is quite capable of being given mitigating effect through that methodology." PA:A5. "For the mitigating evidence to be within the effective reach of the jury in answering the special issues, the special interrogatories must be capable of giving relevant evidence constitutionally sufficient mitigating effect." *Id.* "To determine whether a jury has sufficient vehicles for considering mitigating evidence, the habeas court must determine whether 'there is no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of the [mitigating evidence].'" PA:A6 (quoting *Johnson v. Texas,* 509 U.S. 350, 368 (1993)).

The lower court held that Brewer's "evidence of one hospitalization for a single episode of non-psychotic major depression" was not beyond the reach of the jury because it

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[8] Subsequently, Brewer unsuccessfully requested permission to raise additional claims. Brewer filed an amended petition "under protest" on September 30, 2002, and appealed the district court's order denying leave to amend. The court of appeals dismissed the appeal for lack of jurisdiction on February 5, 2003. *Brewer v. Cockrell,* No. 02-11310 (5th Cir. 2003) (unpublished order).

was not "chronic and/or immutable." PA:A7 (citing *Bigby v. Dretke*, 402 F.3d 551, 571 (5th Cir. 2005) (holding Bigby's "chronic and severe" schizophrenia, which "cannot be adequately controlled or treated," made him unable "to conform his behavior" or "avoid criminal behavior" and, thus, was beyond the scope of the special issues)). The court of appeals also held that Brewer's evidence of a "troubled childhood may, as a result of its temporary character, fall sufficiently within the ambit of the special dangerousness instruction." PA:A6-7 & n.16 (citing *Graham v. Collins*, 506 U.S. 461, 475-76 (1993)). Finally, the court below explained that "a jury can adequately incorporate evidence of short-term mental illness and substance abuse into its decision calculus." PA:A8.

The lower court denied rehearing on March 1, 2006. PA:A1.[9] The instant petition for certiorari review followed.

ARGUMENT

I. The Question Presented for Review Is Unworthy of the Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10 (West 2005). Brewer advances no compelling reason in this case, and none exists. Moreover, this proceeding is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides in relevant part that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was contrary to, or involved an

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[9] On rehearing, the court of appeals withdrew its earlier opinion, *Brewer v. Dretke*, 410 F.3d 773 (5th Cir. 2005), and substituted the current opinion in its place. PA:A1.

> unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> (e)(1) In a proceeding initiated by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254 (West 2005).

This Court has explained that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court precedent, yet reaches an opposite result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Alternatively, a state court "unreasonably applies" clearly established federal law if it correctly identifies the governing precedent but unreasonably applies it to the facts of a particular case. *Id.* at 407-09.

A federal habeas court's inquiry into unreasonableness should be objective rather than subjective, and a court should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams*, 529 U.S. at 409-11. Rather, federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable, "[w]hether or not [this Court] would reach the same conclusion." *Woodford v. Visciotti*, 537 U.S. 19, 27 (2002); *Williams*, 529 U.S. at 411. As the Court recently explained:

[T]he range of reasonable judgment can depend in part on the nature of the

> relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

Finally, it is the state court's "ultimate decision" that is to be tested for unreasonableness, "not every jot of its reasoning." *Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir. 2001); *see also Neal v. Puckett,* 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*) (holding that a federal court's "focus on the 'unreasonable application' test under section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence").

II. The Lower Court Correctly Determined That Brewer's Jury Was Able to Give Sufficient Effect to His Mitigating Evidence Within the Scope of the Special Issues.

In *Penry I,* this Court was forced to reconcile its plurality opinions in *Woodson v. North Carolina,* 428 U.S. 280, 303-04 (1976) (which requires that a capital-sentencing authority be allowed to consider mitigating circumstances), *Jurek,* 428 U.S. at 276 (explaining that the pre-1991 Texas special issues — deliberateness and future dangerousness — allowed Texas juries to consider mitigating circumstances), and the unique, double-edged mitigating circumstances presented in *Penry I* itself (mental retardation, brain damage, and severe child abuse). 492 U.S. at 320-25. The resultant decision was a carefully crafted and, ultimately, case-specific compromise.

A. *Penry I* and *Jurek*: most types of mitigating evidence can be considered in answering the former special issues.

At the root of *Penry I* are found the competing interests involved in capital sentencing: the requirement for an individualized determination of moral culpability based on both aggravating and mitigating factors, and the need to adequately guide and channel a jury's consideration of these factors. The *Woodson* line of cases first construed the Eighth Amendment to require that a capital-sentencing jury not be precluded from consideration, as a mitigating factor, of the character and record of the individual offender, as well as the circumstances of the particular offense. *Eddings,* 455 U.S. at 111-12; *Lockett,* 438 U.S. at 604; *Woodson,* 428 U.S. at 303-04.

As the Court explained, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry I,* 492 U.S. at 319 (quoting *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). However, not all evidence presented as mitigating must be considered as such. *Franklin,* 487 U.S. at 174; *Skipper v. South Carolina,* 476 U.S. 1, 7 n.2 (1986). Nor is it constitutionally required that consideration of mitigating evidence be structured or balanced in any particular way. *Franklin,* 487 U.S. at 179; *Booth v. Maryland,* 482 U.S. 496, 502 (1987), *overruled on other grounds, Payne v. Tennessee,* 501 U.S. 808 (1991); *Zant v. Stephens,* 462 U.S. 862, 875-76 (1983).

Prior to the development of the rule in *Eddings,* the *Jurek* plurality held that the Texas special issues were constitutional because "the enumerated questions allow consideration of particularized mitigating factors," *e.g.*, a defendant's criminal record (or lack thereof), the

range of severity of such a record, his youth, the circumstances of the crime, duress and mental or emotional disturbance, and remorse.[10] 428 U.S. at 272-73. This conclusion was reaffirmed in *Lowenfield v. Phelps*, 484 U.S. 231, 245 (1988), and in *Franklin*, 487 U.S. at 182.

Thereafter, the *Penry I* Court held that the Texas special issues, as applied to Penry, did *not* allow consideration of his specific evidence of mental retardation, brain damage, and severe child abuse. 492 U.S. at 322. This was because the evidence, which suggested that Penry was "less able ... to control his impulses or to evaluate the consequences of his conduct," did not necessarily suggest that his murderous actions were less than deliberate. *Id.* Additionally, Penry's evidence indicated that he was unable to "learn from his mistakes," and was relevant to the future-dangerousness special issue *only* as an *aggravating* factor. *Id.* at 323. Thus, neither special issue provided a vehicle for the jury to give mitigating effect to Penry's "two-edged" evidence. *Id.* at 324. Yet the Court specifically noted that its *Penry I* opinion did *not* negate the facial validity of the Texas special issues, nor did it change the fact that other types of mitigating evidence *could* be considered under the plain language of the special issues. *Id.* at 315-19.

During its next term, the Court acknowledged the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde v. California*, 494 U.S. 370, 380 (1990). Accuracy is important, but finality equally so. *Id.* As a result, the Court crafted a legal standard for reviewing ambiguous jury instructions that relies not on subjective and hypothetical hairsplitting but on objective and reasonable analysis. *Id.* at 378-81. The Court held that a *mere possibility* that the jury was precluded

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[10] Brewer fails to cite *Jurek* whatsoever or acknowledge that it remains controlling authority. *See Graham*, 506 U.S. at 474-77 (explaining that *Penry I* is the exception to *Jurek*).

from considering relevant mitigating evidence did *not* establish Eighth Amendment error. *Id.* at 380. Rather, such error occurred only if there was a "reasonable likelihood" that the jury applied its instructions in a way that prevented the consideration of such evidence. *Id.*

Indeed, the Court would continue to endorse *Jurek* and limit the application of *Penry I* where the mitigating evidence presented was not *solely aggravating* when viewed through the lens of the special issues. For example, in *Graham*, the Court declined to "read *Penry* [*I*] to effect a sea change in the Court's view of the constitutionality of the ... Texas death penalty statute." 506 U.S. at 474. Instead, the Court distinguished the thrust of Graham's mitigating evidence — "that his brief spasm of criminal activity ... was properly viewed, in light of his youth, his background, and his character, as an aberration that was not likely to be repeated" — from Penry's. *Id.* at 475. The "mitigating significance" of Graham's evidence did not compel affirmative answers to the special issues as did Penry's evidence, but instead suggested that Graham would *not* be a future danger. *Id.* at 475-76. Thus, as in *Boyde*, the possibility that mitigating evidence might have "*some* arguable relevance beyond the special issues" was immaterial as long as the jury was able to give effect to the evidence in some meaningful way. *Id.* at 476 (emphasis in original).

In *Johnson*, the Court concluded that "[i]t strains credulity to suppose that the jury would have viewed the evidence of [Johnson]'s youth as outside its effective reach in answering the [future-dangerousness] special issue." 509 U.S. at 368. This is the case even if the mitigating evidence could also be viewed as aggravating; constitutional error results only if the evidence is unavoidably aggravating within the context of the special issues. *Id.* at 368-69; *cf. Coble v. Dretke*, 444 F.3d 345, 361 (5th Cir. 2006) ("The requirements of the Eighth Amendment are satisfied even if evidence is aggravating, as long as the mitigating aspect is within the effective reach of the jury") (internal quotations omitted); *Cole v. Dretke*,

418 F.3d 494, 507 n.54 (5th Cir. 2005) ("[A] jury cannot give mitigating effect to evidence that can be seen as *aggravating only*") (emphasis in original). Few types of mitigating evidence will have only aggravating relevance within the special issues. Indeed, this is precisely what the lower court held. *See* PA:A8 (*Penry I* error results where "the only logical manner in which [the] jury could have considered the [mitigating] evidence [] under the future-dangerousness special issue was as an aggravating factor").

B. *Tennard* and constitutional relevance

As the court below accurately explained:

> In following *Penry I*, this [C]ourt developed a two-part test for determining whether the defendant's evidence requires a special mitigation instruction: (1) whether the proffered material was constitutionally relevant mitigating evidence and (2) whether the proffered evidence was beyond the effective reach of the jurors.[11] We in turn defined "constitutionally relevant" evidence as that which was "due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own ...."[12] In *Tennard*, however, the Supreme Court flatly rejected that test of constitutional relevance and instructed us instead that the definition of relevance in this context is no different from the definition of relevance in most others: "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence ...."

PA:A5.

In essence, the *Tennard* Court chastised the Fifth Circuit for invoking "its own restrictive gloss on *Penry I*" — constitutional relevance — as a screening test. 542 U.S. at 283. The Court explained that this was "an improper legal standard." *Id.* at 287. Instead,

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[11] *Smith v. Cockrell*, 311 F.3d 661, 680 (5th Cir. 2002) (internal citations and quotations omitted).

[12] *Graham v. Collins*, 950 F.2d [at] 1029 [], *aff'd*, 506 U.S. 461 [] (1993).

> [T]he "meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other context, and thus the general evidentiary standard — "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" — applies.

Id. at 284 (quoting *McKoy v. North Carolina,* 494 U.S. 433, 440 (1990)). "Once this low threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." *Id.* at 285 (quotations and citations omitted).

C. *Smith*'s "full effect" requirement means nothing more than *sufficient* effect.

The Court's opinion in *Smith v. Texas,* 543 U.S. 37 (2004), noted its ruling in *Tennard* but focused on an entirely different issue: a nullification instruction similar to the one addressed in *Penry v. Johnson,* 532 U.S. 782 (2001) (*Penry II*). This instruction "did not provide the jury with an adequate vehicle for expressing a 'reasoned moral response' to all of the evidence relevant to the defendant's culpability." *Smith,* 543 U.S. at 45-48 (quoting *Penry II,* 532 U.S. at 796) (emphasis in original). This is because the nullification instruction "'essentially instructed [the jury] to return a false answer to a special issue in order to avoid a death sentence.'" *Id.* at 48 (quoting *Penry II,* 532 U.S. at 801). Importantly, no nullification instruction was submitted in the instant case. In this sense, *Smith* — and *Penry II* — are not on point.

Brewer suggests, however, that *Smith* and *Penry II* dramatically changed the meaning of *Penry I.* Relying on *dicta* in both opinions, he proposes that Eighth Amendment error occurs if "*full* consideration and *full* effect" are not given to the mitigating evidence. *Smith,* 543 U.S. at 37 (citing *Penry II,* 532 U.S. at 797). Thus, Brewer argues that *Smith* implicitly

overruled *Johnson, Graham,* and *Boyde,* converting the reasonable-likelihood harm analysis of those cases into a presumed-harm standard. However, this is not the case, as the court below explained:

> For the mitigating evidence to be within the effective reach of the jury in answering the special issues, the special interrogatories must be capable of giving relevant evidence constitutionally sufficient mitigating effect. Whether that sufficiency requires that the evidence be given "full," or merely "some," mitigating effect has been the subject of considerable discussion in this court, but ultimately the distinction is only one of semantics, because regardless of what label is put on the word "effect," it is indisputable that the effect must be constitutionally "sufficient." Even if the requirement is called "full," it means nothing more than "sufficient."

PA:A5; *cf. Tennard v. Dretke,* 442 F.3d 240, 256 (5th Cir. 2006) ("The key inquiry ... is whether the jury could give sufficient *mitigating* effect to Tennard's evidence") (emphasis in original); *Cole,* 418 F.3d at 499 (special issues "must confer sufficient discretion on the sentencing body to consider the character and record of the individual offender") (internal quotations omitted); *Bigby,* 402 F.3d at 564 (same) (quoting *Graham,* 506 U.S. at 468).

The lower court's reasoning is sage. The *Smith* Court certainly did not overrule *Jurek* and hold that the former special issues were invariably inadequate for the consideration of mitigating evidence. Rather, the Court merely held that Smith's evidence, as presented, was not all within the effective reach of the jury. The "*full* consideration" language in *Smith* is quoted directly from Justice O'Connor's dissent in *Johnson,* as quoted in *Penry II. Smith,* 543 U.S. at 38, 46 (quoting *Penry II,* 532 U.S. at 979 (quoting *Johnson,* 509 U.S. at 381)). This language is merely *dicta,* because it would otherwise overrule *Jurek.* This Court previously held that no such "sea change" occurred in light of *Penry I. Graham,* 506 U.S. at 474. It should not so hold now. *Cf. Coble,* 444 F.3d at 358 ("The Supreme Court's rulings in *Penry II* and *Smith* should not be read to disturb its earlier holdings affirming the

constitutionality of Texas'[s] statutory death penalty sentencing scheme") (quoting *Bigby*, 402 F.3d at 570); *Tennard*, 442 F.3d at 253 n.17 (declining to interpret *Smith* and *Tennard* as new rules); *Cole*, 418 F.3d at 508 ("Neither *Tennard* nor *Smith* changes *Johnson*'s analysis of *Penry*, or the result that we reach today"); *In re Kunkle*, 398 F.3d 683, 685 (5th Cir. 2005) (*per curiam*) ("We are not persuaded that the Court intended to undercut *Jurek*, *Graham*, and *Johnson* without even citing them. Whether ... *Smith* sweep[s] so broadly as to create a conflict with its own *Jurek* or *Graham* decisions is for the Supreme Court").

As discussed above, the Court has recognized that, in most cases, the former special issues remain constitutional because they "allow consideration of particularized mitigating factors." *Jurek*, 428 U.S. at 272-73. The fact that mitigating evidence might have "*some* arguable relevance beyond the special issues" is immaterial because "virtually *any* mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' apart from its relevance to the particular concerns embodied in the Texas special issues." *Graham*, 506 U.S. at 476 (citing *Franklin*, 487 U.S. at 190 (Stevens, J., dissenting)) (emphasis in *Graham*). To demonstrate Eighth Amendment error, there must exist more than "the mere possibility" that the jury was prevented from giving effect to mitigating evidence. *Johnson*, 509 U.S. at 367. A "*full* consideration" rule would fly in the face of this valid and binding precedent.

Thus, when *Penry I* and its progeny are viewed as a whole, the following Eighth Amendment inquiry may be derived: (1) whether the mitigating evidence has met the low threshold for relevance established in *Tennard* and, if so, (2) whether the evidence was within the effective reach of the jury in answering the special issues. 542 U.S. at 284-85; *cf. Coble*, 444 F.3d at 358; *Bigby*, 402 F.3d at 564-65. As the court of appeals explained, "[f]or the mitigating evidence to be within the effective reach of the jury in answering the special

issues, the special interrogatories must be capable of giving relevant evidence constitutionally sufficient mitigating effect." PA:A5; *cf. Tennard,* 442 F.3d at 257; *Cole,* 418 F.3d at 499; *Bigby,* 402 F.3d at 564. Of course, this inquiry is subject to the deferential standard of 28 U.S.C. § 2554(d)(1). PA:A3-4; *cf. Tennard,* 542 U.S. at 288-89; *Coble,* 444 F.3d at 349-50; *Tennard,* 442 F.3d at 254. Moreover, the lower court's *Penry* jurisprudence — addressing which kinds of mitigating evidence may be given sufficient effect within the special issue framework — survived *Smith* and *Tennard* where it did not rely upon constitutional relevance. PA:A6-7 nn.16-18.

D. The court below properly rejected Brewer's *Penry I* claim.

Brewer's mitigating evidence is relevant within the meaning of *Tennard.*[13] However, there is no *reasonable* likelihood the jury was precluded from giving constitutionally sufficient mitigating effect to it in answering the Texas future-dangerousness special issue.[14] Initially, the court below correctly held that Brewer's minimal evidence of child abuse was within the purview of future dangerousness especially where, as here, the possibility of rehabilitation was highlighted by the defense. PA:A6-8 & n.16 (citing *Graham,* 506 U.S. at 475, *Jacobs v. Scott,* 31 F.3d 1319, 1327 (5th Cir. 1994), and *Cole,* 418 F.3d at 507); 19 RR 878, 884-85; *cf. Clark v. Collins,* 19 F.3d 959, 963 (5th Cir. 1994) (applying *Johnson* — not constitutional relevance — to hold child abuse within the scope of future dangerousness

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[13] Brewer's evidence that his girlfriend was the dominant partner in their relationship is *not* constitutionally relevant, because it is "unlikely to have any tendency to mitigate [his] culpability," and will not be discussed further. *Tennard,* 542 U.S. at 286.

[14] Brewer does challenge the lower court' s decision with regard to his mitigating evidence of marijuana use. Nonetheless, a reasonable jury could easily conclude that Brewer did not act deliberately due to intoxication, or would not be a future danger in prison without access to drugs. *Harris v. Cockrell,* 313 F.3d 238, 242 (5th Cir. 2002); *James v. Collins,* 987 F.2d 1116, 1121 (5th Cir. 1993). Thus, such evidence was within the purview of the special issues.

especially where possibility of rehabilitation exists).

Brewer was not even abused until he was fifteen years old, a fact that stands in marked contrast to *Smith* and *Penry II*. There was no evidence that the abuse "in any way impaired his cognitive abilities." PA:A3 n.3. Thus, the evidence was certainly not *aggravating* within the scope of the future-dangerousness issue. *See, e.g., Robertson v. Cockrell*, 325 F.3d 243, 254 (5th Cir. 2003) (*en banc*); *Lackey v. Scott*, 28 F.3d 486, 490 (5th Cir. 1994); *Motley v. Collins*, 18 F.3d 1223, 1235 (5th Cir. 1994). Importantly, neither *Smith* nor *Penry* dealt with the issue in isolation. *See Penry I*, 492 U.S. at 322-23 (explaining that it was Penry's lack of impulse control and inability to learn from his mistakes that gave rise to error); *Robertson*, 325 F.3d at 253 ("Childhood abuse alone is not systematically discussed by *Penry I* in its relation to the Texas special issues"). Brewer's evidence of child abuse — especially the minimal amount of abuse suffered — is, without a doubt, within the scope of future dangerousness.

The lower court has rejected post-*Tennard* Eighth Amendment claims based on very similar evidence of a troubled childhood:

> This [C]ourt ... has also held that evidence of a defendant's "unstable" and "transient" childhood could be given effect under the special issues. *Jacobs v. Scott*, 31 F.3d [at] 1327 [] (citing *Graham v. Collins*, 506 U.S. 461 []). In *Jacobs*, we distinguished evidence of a troubled childhood offered by the defendant from that in *Penry I*. *Id.* Jacobs argued that:
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> > evidence was presented showing that Mr. Jacobs had an unstable, troubled childhood. He never knew his mother, and has only vague memories of his father. His father left him to live alone with strangers when he was a small boy, and Mr. Jacobs never saw him again. Mr. Jacobs ended up living in several foster homes as a child, separated from his sister, parents, and all other family connections.

> *Id.* Coble had a troubled childhood similar to that of Jacobs and Graham, "as opposed to a childhood rife with harsh physical abuse like that of Penry." *Id.* Coble's evidence of his troubled childhood included: (1) the death of his father before he was born; (2) poverty in childhood; (3) his stepfather's alcoholism and conflicts with his mother; and (4) his mother's nervous breakdown. His evidence of his childhood is more "transient" and "unstable," like the evidence presented in *Jacobs* and *Graham* than it is similar to Penry's evidence of abuse.[15] Coble's evidence is distinguishable from that in *Penry*.

Coble, 444 F.3d at 362. As in *Coble*, *Jacobs*, and *Graham*, Brewer's childhood troubles — a neglectful and briefly abusive father — were well within the reach of the jury in answering the future-dangerousness special issue.

Similarly, the lower court properly reasoned that the evidence Brewer "had a bout with depression three months before the murder" and "was briefly hospitalized for that depression" was well within the scope of the future-dangerousness issue. PA:A6-7 & nn.17-18. While Brewer argues that he was involuntarily committed, the record reveals that Brewer actually signed "voluntary papers stating that he had signed a request for voluntary admission" to Big Spring State Hospital. 18 RR 759; *Brewer v. State*, slip op. at 15. The jury was fully aware that the initial "involuntary" commitment was initiated by Brewer's

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[15] Graham produced evidence of his childhood poverty, his parents' separation, and his mother's "nervous condition." *Graham*, 506 U.S. at 463-64. As this Court explained:

> we are not convinced that *Penry* could be extended to cover the sorts of mitigating evidence Graham suggests without a wholesale abandonment of *Jurek* and perhaps also of *Franklin v. Lynaugh*. As we have noted, *Jurek* is reasonably read as holding that the circumstance of youth is given constitutionally adequate consideration in deciding the special issues. We see no reason to regard the circumstances of Graham's family background and positive character traits in a different light. Graham's evidence of transient upbringing and otherwise nonviolent character more closely resembles Jurek's evidence of age, employment history, and familial ties than it does Penry's evidence of mental retardation and harsh physical abuse.

Id. at 475.

family based upon a suicide note and nothing more. 18 RR 763. In fact, Brewer's mother testified that he "committed himself" because "he wanted to turn his life around" and "get off of drugs." *Id.* at 825-26. Brewer later checked himself out of Big Spring State Hospital to live with Nystrom in Amarillo. *Id.* at 826-27. Therefore, the record plainly refutes Brewer's effort to characterize his depression as an incurable or untreated mental illness that limited his impulse control. Indeed, Brewer presented no expert opinion on the matter. PA:A2, 6 n.16.

Nevertheless, Brewer's evidence was plainly within the jury's reach because treatable mental problems can be given sufficient mitigating effect in answering the future-dangerousness inquiry. *See Hernandez v. Johnson,* 248 F.3d 344, 349 (5th Cir. 2001) (holding "evidence of chronic schizophrenia could be considered by the jury in answering the question of future dangerousness," because "[w]ith medication and treatment, remission can be sustained"); *Robison v. Johnson,* 151 F.3d 256, 265-67 (5th Cir. 1998) (holding that evidence of petitioner's schizophrenia, including testimony that it was treatable and could go into remission, could be given mitigating effect under the future-dangerousness special issue); *Lucas v. Johnson,* 132 F.3d 1069, 1082-83 (5th Cir. 1998) (finding evidence that a defendant was psychotic and schizophrenic, but that his mental problems had responded to antipsychotic drugs and was treatable, could be considered under the future-dangerousness special issue); *Demouchette v. Collins,* 972 F.2d 651, 653 (5th Cir. 1992) (holding that a jury was able to consider the mitigating effect of evidence of personality disorder under first special issue where major thrust of evidence was that the disorder caused defendant to act impulsively rather than deliberately).

Recent, post-*Tennard* circuit precedent affirms the reasoning of these opinions. *See Coble,* 444 F.3d at 361-62 (holding treatable bipolar and posttraumatic stress disorders within

scope of future-dangerousness issue); *Cole*, 418 F.3d at 505-07 (holding organic neurological deficiency including diminished impulse control within scope of future-dangerousness issue); *but see Tennard*, 442 F.3d at 256 (finding *Penry* violation where evidence showed low IQ, a "static trait" or "permanent physiological feature"); *Bigby*, 402 F.3d at 571 (paranoid schizophrenia not amenable to treatment or control not within scope of future dangerousness). A treatable mental disorder or an exceedingly ordinary problem like depression is distinctly different from a chronic mental illness, like Penry's, that prevents a defendant from ever learning from his or her mistakes. *Cole*, 418 F.3d at 505-07; *cf Bigby*, 402 F.3d at 571 ("Even after being in the controlled environment of jail for some time, Bigby irrationally tried to take the trial court judge hostage in the presence of armed bailiffs," demonstrating inability to conform conduct with law).

Brewer argues that the lower court's decision runs afoul of *Smith* and *Tennard* by attempting to revive the "severity" and "permanence" elements of the former constitutional relevance test. Yet this Court noted that "gravity" has a place in the *Penry I* calculus "insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability." 542 U.S. at 286 (citation omitted). Gravity is a synonym for severity, seriousness, or importance. THE AMERICAN HERITAGE COLLEGE DICTIONARY 595 (3d ed. 2000). Similarly, transient or impermanent characteristics are less likely to mitigate culpability. Either concept certainly bears whether the likelihood of *Penry I* error is reasonable. Any other interpretation would lead to a *per se*-error analysis and overrule *Jurek*, *Graham*, and *Johnson*.

Moreover, *Tennard* and *Smith* do not support Brewer's argument, because the opinions deal only with the application of severity or permanence as a "screening test" which might foreclose reaching "the heart of [a petitioner]'s *Penry* claims." *Tennard*, 542 U.S. at

282-86. Here, the court of appeals *did* reach the heart of Brewer's *Penry* claim and discussed each category of the evidence. In fact, Brewer reads far too much into *Tennard* and *Smith* when he suggests that they dispense with any comparative analysis of the mitigating evidence. Reasonableness can hardly be judged in the absence of such comparisons.

Finally, unlike *Tennard,* the prosecutor did not ask the jury to consider Brewer's mitigating evidence as aggravating. The prosecuting attorney certainly argued the State had carried its burden of proof concerning Brewer's probable future dangerousness. 19 RR 897-98. But the prosecutor based this argument on the *aggravating* evidence presented by the State, not Brewer's mitigating evidence. For example, the State asked the jury, "What kind of man can say that he loves a woman and slam her with this kind of force up against a locker?"[16] *Id.* at 897. The prosecuting attorney also pointed out that, "[b]y the time [Brewer] is [fifteen] years of age, from that time on, he carries weapons, he carries knives ... [t]o hurt people."[17] *Id.* The State's argument that Brewer would "never change," 19 RR 898, was merely a legitimate response to defense counsel's suggestion that Brewer could be rehabilitated if sentenced to life in prison. *Id.* at 878, 884-85. Importantly, however, the prosecutor did not "press[] exactly the most problematic interpretation of the special issues, suggesting that [Brewer's mitigating evidence] was irrelevant in mitigation, but relevant to the question whether he posed a future danger." *Cole,* 418 F.3d at 508 (quoting *Tennard,* 542 U.S. at 289).

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[16] The State presented evidence that Brewer assaulted his former girlfriend, Amy Forrester, by picking her up and shoving her against the edge of a metal locker, thereby paralyzing her right arm for nearly two years. 18 RR 592-97.

[17] There was testimony that Brewer was sent to an alternative school on more than one occasion for threatening another child with a knife and for fighting, and that he was arrested carrying a concealed knife in a neighborhood known for drug activity. 18 RR 640-41, 657-61.

III. The State Court Reasonably Rejected Brewer's *Penry I* Claim.

On direct appeal, the Court of Criminal Appeals carefully considered Brewer's *Penry* claim and reasonably applied the appropriate Supreme Court precedent. Initially, the state court's explication of the Eighth Amendment's evolution from *Jurek* to *Penry* via *Lockett, Eddings,* and *Franklin* was a proper statement of the law. *Brewer v. State,* slip op. at 13-14. The court then correctly explained that, in addressing a *Penry I* claim, it must determine:

> (1) what mitigating evidence was presented to the jury; (2) whether the [deliberateness and future-dangerousness] issues provided a vehicle for the jury to give effect to that evidence and, if not, (3) whether the trial judge provided, in its charge to the jury on punishment, a vehicle for the jury to effectively consider the mitigating evidence.

Id. at 14 (citing *Joiner v. State,* 825 S.W.2d 701, 706 (Tex. Crim. App. 1992)).

Finally, the court "conclude[d] the [future-dangerousness] issue provided an adequate vehicle for the jurors to give effect to [Brewer]'s mitigating evidence." *Id.* at 15. The court noted that "a stay in a mental hospital does not evidence a long term mental illness which would affect [Brewer]'s ability to conform to the requirements of society." *Id.* (internal quotations omitted). The court also held that Brewer's evidence of drug abuse and a troubled childhood was within the scope of the future-dangerousness special issue. *Id.* As explained *supra,* this holding is not contrary to the Court's precedent nor is it an unreasonable application thereof.

CONCLUSION

For the foregoing reasons, the Court should deny Brewer's petition for writ of certiorari.

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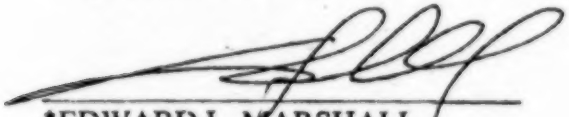

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File Date
Aug. 14, 2006

No. 05-11287

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2005

BRENT RAY BREWER,
Petitioner,

-v-

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

THIS IS A CAPITAL CASE.

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October Term 2005

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT IN REPLY

Respondent's Brief in Opposition ("BIO") focuses on the merits of Petitioner's claim under Penry v. Lynaugh, 492 U.S. 302 (1989) ("Penry I"), and completely (if understandably) ignores the most compelling reason supporting a grant of *certiorari* – namely, that the Fifth Circuit and the Texas Court of Criminal Appeals have both openly expressed uncertainty about whether to follow the unambiguously broad reading of Penry I set out in this Court's *per curiam* decision in Smith v. Texas, 543 U.S. 37 (2004). Equally important, both courts have, for the most part, resolved this tension by following their own pre-Smith cases, despite the fact that those cases are irreconcilable with Smith's rationale and result. As Petitioner has pointed out, the answer to this question will determine the outcome in dozens of Texas capital appeals yet to be decided. *See* Petition for Writ of

Certiorari ("Petition") at 31-33. Accordingly, as we emphasize below, this important question merits definitive resolution by this Court.

With respect to the merits of Petitioner's Penry I claim, Respondent – like the Fifth Circuit – proceeds from the premise that this Court did not mean what it said in Smith. BIO at 9 ("Smith's 'full effect' requirement means nothing more than *sufficient* effect"). Relying on this "sage" insight, BIO at 14, Respondent argues that Petitioner's evidence of childhood abuse and mental disorder as a young adult was insufficiently severe to require additional instructions beyond the "deliberateness" and "future dangerousness" questions of the pre-1991 Texas capital sentencing statute. BIO at 20. Such an analysis ignores Smith and rewrites Tennard and Penry, as illustrated by the Fifth Circuit's continuing movement away from the clear direction charted by Smith. *See, e.g.*, Garcia v. Quarterman, ___ F.3d.___, 2006 WL 1932895 (5th Cir., July 13, 2006). For all these reasons, Petitioner's Penry I claim warrants plenary review.

1. *Certiorari* is warranted because the Fifth Circuit has conceded that its own decisions are in tension with Smith, indicating an urgent need for guidance before the Fifth Circuit goes any further down the wrong road.

One compelling reason to grant review here is that the Fifth Circuit has openly acknowledged its uncertainty about the meaning of Smith. *See* Petition at 8-13. Soon after Smith, for example, the Fifth Circuit indicated that it understood Smith to be "limited to [evidence of] mental impairment," despite the absence of any such limitation in the text of this Court's opinion. *In re* Kunkle, 398 F.3d 683, 685 (5th Cir. 2005). The court below expressly added that whether Smith swept any more broadly was a question for *this* Court. Id. A few months later, in R.G. Smith v. Dretke, 422 F.3d 269 (5th Cir. 2005), the Fifth Circuit acknowledged that its prior Penry jurisprudence, which held that mitigating evidence of "an impoverished background, growing up in a crime-infested environment

and alcohol abuse" could be given adequate effect in answering the special issues, was in tension with Smith, where this Court indicated that at least two of those same factors had "little, if anything, to do with" the special issues. R.G. Smith, 422 F.3d at 287 n.8 (conceding that this Court's opinion in Smith appeared to take "the exact opposite" position from the Fifth Circuit's longstanding view of Penry as essentially limited to mental retardation).

In a third decision in March 2006, the Fifth Circuit expressly acknowledged that "tension" exists between the "some effect" standard consistently applied in its own decisions and the emphatic "*full* consideration and *full* effect" standard declared by this Court in Penry II and Smith. *See* Tennard v. Dretke, 442 F.3d 240, 253 n.7 (5th Cir. 2006). As in R.G. Smith, however, the Fifth Circuit discounted the need to resolve that tension, breezily announcing that it would "leave it to other[s] to tidy the High Court's Augean stables." Id.

The Texas Court of Criminal Appeals ("CCA"), too, remains "uncertain as to the Supreme Court's current Penry II jurisprudence." *Ex parte* Smith, 185 S.W.3d 455 (Tex. Crim. App. 2006) (denying Penry relief on remand from this Court). The CCA recognizes that "numerous post-Smith, post-Tennard Fifth Circuit cases have held that mitigating evidence [like that at issue in Smith] is fully encompassed by the Texas 'future dangerousness' or 'deliberation' special issues." Id. at 466 and n.35.[1]

These cases speak with one voice in calling for guidance from this Court with respect to this issue, which will recur in scores of Texas cases. *See* Petition at 8-13. Collectively, these decisions demonstrate a serious need for this Court to correct the Fifth Circuit's misreading of Smith *now*.

[1] Smith's petition seeking review of the CCA's most recent decision in his case is pending before this Court *sub nom.* Smith v Texas, No. 05-11304.

before it goes too far in the wrong direction.[2]

2. *Certiorari* is warranted because the Fifth Circuit's decision in this case simply revives the discredited "severity" and "permanence" tests emphatically rejected in Tennard.

Respondent defends the Fifth Circuit's attempt in this case to revive the "severity" and "permanence" criteria, prominent features of its notorious pre-Tennard screening test for "constitutionally relevant mitigating evidence," as the key variables in the Penry calculus. *See* BIO at 20-21. Respondent even goes so far as to claim that this approach is endorsed by Tennard itself. Id. Respondent is mistaken.[3]

To find that that Petitioner's evidence of mental illness (clinical depression, for which he was involuntarily committed to a mental hospital) was within the jury's "effective reach" under the "future dangerousness" question, the Fifth Circuit applied a *per se* rule distinguishing chronic or permanent mental disorders from any other type or manifestation of mental illness. Brewer v. Dretke, 442 F.3d 273, 280 (5th Cir. 2006) (mitigating evidence of mental illness gives rise to a Penry I violation only "where the illness in question is chronic and/or immutable") (footnotes omitted). According to this view, since Petitioner's mental disorder was non-permanent, the future

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[2] The Fifth Circuit applied its baseless "constitutional relevance" test for mitigating evidence to reject Penry claims for nearly a decade before this Court struck down that rule as having "no foundation" in the Eighth Amendment. *See* Tennard v. Dretke, 542 U.S. 274 (2004). It would be regrettable if the Fifth Circuit's current and equally serious error – in profoundly misreading Smith – essentially mooted this Court's recent efforts to set the jurisprudence straight.

[3] Remarkably, Respondent argues that "this Court noted [in Tennard] that 'gravity' has a place in the Penry I calculus 'insofar as evidence of a trivial feature of the defendant's character ... is unlikely to have any tendency to mitigate [his] culpability.'" BIO at 20 (citing Tennard, 542 U.S. at 286). Of course, when this Court made that observation in Tennard, the example it offered of such a "trivial feature" was *how often the defendant takes a shower*. *See* Tennard, 542 U.S. at 286. This Court should reject Respondent's obtuse suggestion that a history of clinical depression is no more relevant

dangerousness issue gave the jury an adequate vehicle for giving it "sufficient" mitigating consideration and effect. Id. at 278-79.[4]

These "severity" and "permanence" requirements for obtaining relief under Penry I simply resurrect the threshold screening test Tennard rejected. Tennard makes clear that a court reviewing for Penry I error should not assess the "permanence" or "severity" of the condition the defendant asserts as mitigating, but instead ask whether the jury could have expressed its reasoned moral response to the relevant mitigating qualities of that evidence in answering the special issues. Tennard, 542 U.S. at 287-89.

Respondent defends the Fifth Circuit's analysis despite its utter failure to appreciate what is actually *mitigating* about a defendant's underlying mental disorder – *i.e.*, its effect on the defendant's moral culpability. *That* aspect of the underlying mental disorder is not captured in any way by the fact that there may exist some remote possibility that the disorder, as the years pass, may become less severe. Contrary to the Fifth Circuit's reasoning, the potential mitigating significance of Petitioner's clinical depression is not reduced by the fact that he suffered only a "single episode" rather than repeated episodes, or the fact that his depression manifested itself "without psychotic features." Brewer, 442 F.3d at 275 n.1. None of these aspects of the "severity" of Petitioner's mental disorder placed the relevant mitigating qualities of that condition within the reach of jurors permitted to answer only whether Petitioner would be dangerous in the future.

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to a defendant's moral culpability than his hygiene.

[4] The Fifth Circuit has reflexively applied the same rule in its other post-Smith decisions, relying each time on its own pre-Smith opinions. *See, e.g.*, Coble v. Dretke, 444 F.3d 345, 361 (5th Cir. 2006) (bipolar disorder and Vietnam-related post-traumatic stress disorder not permanent and hence not problematic under Penry).

Contrary to Respondent's view, even if jurors believed that Petitioner would never again suffer an episode of clinical depression, the "future dangerousness" inquiry did not give them a "meaningful basis to consider the relevant mitigating qualities" of that mental disorder. Johnson v. Texas, 509 U.S. 350, 369 (1993). If a juror concluded that Petitioner's mental disorder was acting on him at the time of the crime and thereby reduced his moral culpability, but *also* concluded based on the evidence as a whole that Petitioner might well act out violently in the future, regardless of whether he suffered additional bouts of clinical depression, she would have no vehicle for withholding a death sentence.

Smith forecloses Respondent's argument that allowing jurors to consider and give effect to the "non-permanent" nature of a serious mental disorder is an acceptable substitute for allowing them directly to consider and give effect to its actual consequences for an offender's moral culpability. While the transience or amenability to treatment of a particular mental disorder might make it *less aggravating* under the future dangerousness question, this Court's cases demand that the jury be provided a vehicle for considering such evidence *as mitigating* – not simply as "potentially somewhat less aggravating." This Court should grant *certiorari* to reaffirm this central tenet of Eighth Amendment jurisprudence.

3. *Certiorari* is warranted because the Fifth Circuit's decisions continue to take that court farther and farther from the course clearly charted by this Court in Smith.

As noted, in the absence of direction from this Court, the Fifth Circuit continues to veer from the course set in Smith. The most recent example of this trend is Garcia v. Quarterman, ___ F.3d.___, 2006 WL 1932895 (5th Cir., July 13, 2006). Garcia argued that the jury was unable to give mitigating effect to evidence that he had been repeatedly sexually abused before he was ten

years old. *See* Garcia, 2006 WL 1932895 at *3 - *7 (describing penalty-phase evidence). Garcia's jury received only the two standard "deliberateness" and "future dangerousness" queries, plus a "nullification instruction." Id. at *7. The Fifth Circuit majority found no Penry error. While expressly disavowing any reliance on procedural default, the majority asserted flatly that defense counsel was *required to argue for jury nullification* at trial (*i.e.*, to demand that the jurors violate their oaths to answer the special issues honestly) in order to claim later that he was harmed by the preclusive effect of the unconstitutional charge. Id. at *8 ("Garcia cannot seek mitigating treatment for his childhood abuse because he did not do so before the jury"). It rejected "the ... position that any evidence of childhood abuse must be considered under Penry regardless of the context in which it was offered at trial." Id.

As Garcia makes clear, the Fifth Circuit is busily crafting new "screening tests" to evade this Court's clear guidance in Smith. *See* Garcia, 2006 WL 1932895 at *14 (Benavides, J., dissenting) (criticizing majority's rationale as "an end run around Penry II," an "approach ... at odds at least with the spirit of Tennard" for introducing another "threshold screening test ... [with] no foundation in Supreme Court precedent"), id. at *15 ("Instead of following [Penry's] mandate, the majority creates another threshold screen"). The court below has gone from upholding the use of "nullification" charges as vehicles for the consideration of mitigating evidence to actually *requiring* that defense counsel have argued for nullification before the jury as a condition of later raising a Penry claim. Garcia, *supra*.

The longer this Court waits to intervene, the more distorted and begrudging the Fifth Circuit's application of Smith will likely become.

CONCLUSION AND PRAYER FOR RELIEF

Petitioner's sentencing hearing was marred by the same constitutional flaw as those in Penry and Smith. Jurors heard mitigating evidence about Petitioner's youth, physical and psychological abuse as a child, and serious mental illness. Individually or collectively, that evidence could well have persuaded them to spare Petitioner's life. The jurors, however, were limited to instructions that "had little, or nothing, to do with" Petitioner's mitigating evidence and thus gave them no vehicle for expressing that conclusion. This Court can have no confidence that Petitioner's death sentence represents the jury's actual conclusion that a death sentence was the *appropriate* punishment for his role in the crime. *Cf.* Smith.

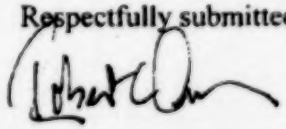
Petitioner lost below despite the fact that the plain language of Smith demands relief. The only explanation for this outcome is that the Fifth Circuit has never taken Smith seriously; instead, the court below has repeatedly questioned whether this Court meant what it said in Smith and has labored at every turn to evade its mandate. Garcia is just the latest and boldest example of the Fifth Circuit's resistance to following this Court's teaching in Smith. Only this Court can bring the Fifth Circuit back into conformity with the requirements of the Eighth Amendment.

This Court has recognized that "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." Williams v. Taylor, 529 U.S. 362, 398 (2000). Equally important, a defendant's "reduced capacity for considered choice" and his "emotional history" both "bear directly on the fundamental justice of imposing capital punishment." Skipper v. South Carolina, 476 U.S. 1, 13-14 (1986) (Powell, J., concurring in judgment). Faithful adherence to those insights suggests the

importance of reviewing – and reversing – the Fifth Circuit's decision in Petitioner's case.

For the reasons set forth above and in his Petition for Writ of Certiorari, Petitioner BRENT RAY BREWER respectfully prays that this Court grant a writ of *certiorari* to give the judgment of the United States Court of Appeals for the Fifth Circuit in this case plenary review; in the alternative, Petitioner asks that the Court summarily reverse the judgment below; or grant such other relief as the interests of justice require, including holding Petitioner's case pending the outcome of any *other* case in which the Court grants review to consider the correct application of Penry, Tennard, and Smith.

Respectfully submitted,



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In the Supreme Court of the United States

BRENT RAY BREWER,

Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONS DIVISION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF OF DERYL MADISON, RONALD CHAMBERS, BILLY COBLE, FERNANDO GARCIA, CHARLES MINES, BILLY NELSON, JONATHAN REED, STEVEN RODRIGUEZ, AND ROY SMITH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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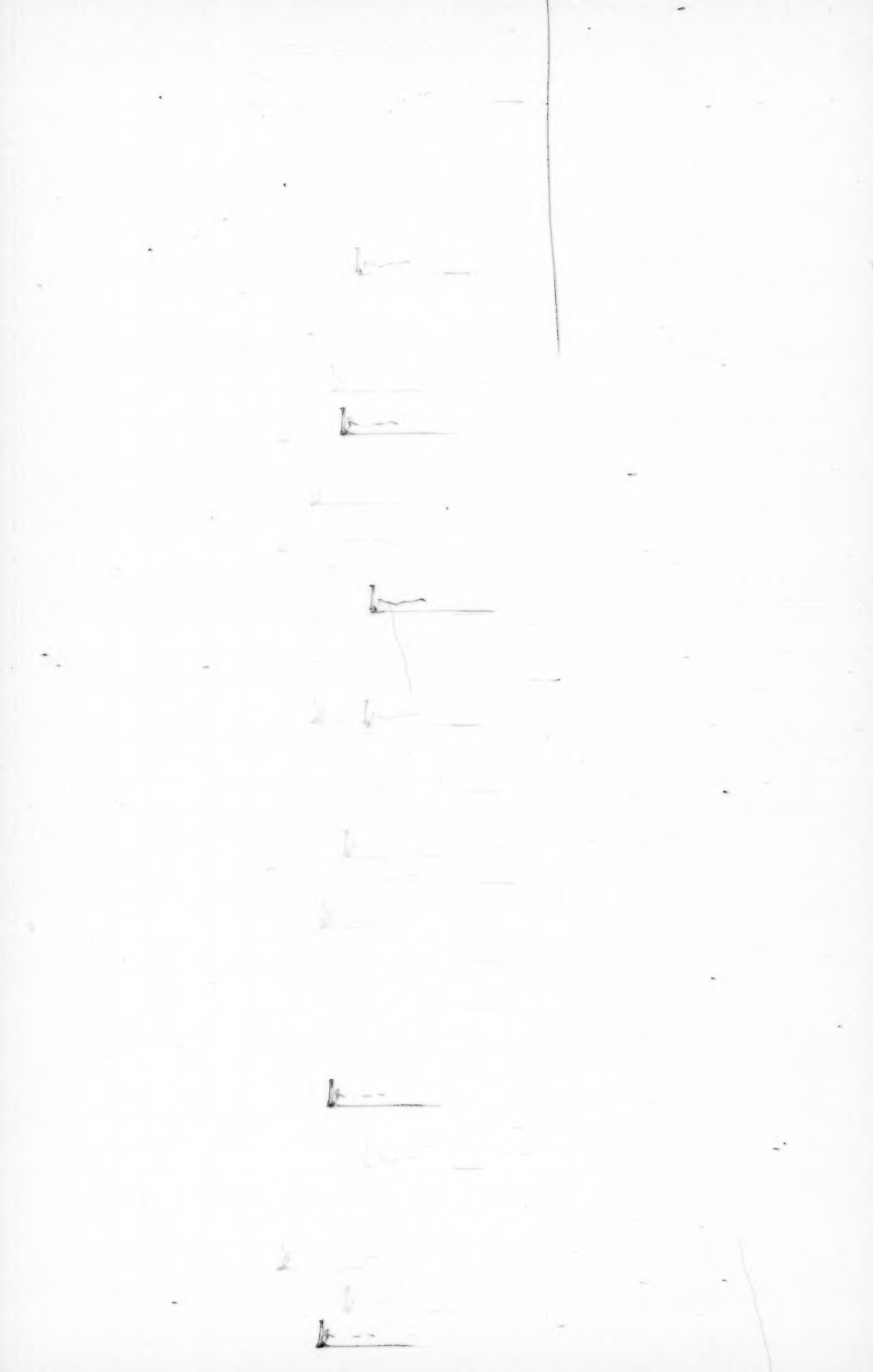

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BRIEF OF DERYL MADISON, RONALD CHAMBERS, BILLY COBLE, FERNANDO GARCIA, CHARLES MINES, BILLY NELSON, JONATHAN REED, STEVEN RODRIGUEZ, AND ROY SMITH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are inmates currently incarcerated on Texas's death row.[2] *Amici curiae* were sentenced under the pre-1991 Texas death penalty statute and have habeas petitions pending in federal court that challenge the constitutionality of their death sentences based on the Court's decisions in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), *Penry* v. *Johnson*, 532 U.S. 782 (2001) ("*Penry II*"), *Tennard* v. *Dretke*, 542 U.S. 274 (2004), and *Smith* v. *Texas*, 543 U.S. 37 (2004) (per curiam). Contrary to the decisions of this Court, the Fifth Circuit has once again adopted a reading of *Penry I* that does violence to this Court's rulings and has and will result in an unconstitutional resolution of *Penry* claims. The correct application of the Court's death penalty jurisprudence is literally a matter of life and death for *amici curiae*.

SUMMARY OF ARGUMENT

For more than a decade, the Fifth Circuit applied its "constitutional relevance" test to deny relief to almost every federal habeas petitioner asserting a *Penry* claim. See *Robertson* v. *Cockrell*, 325 F.3d 243, 256 (5th Cir. 2003). In no uncertain terms, this Court rejected the constitutional relevance test, finding that it "has no basis in our

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[1] No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their counsel made any monetary contribution to the preparation or submission of this brief.

[2] Deryl Madison, Ronald Chambers, Billy Coble, Fernando Garcia, Charles Mines, Billy Nelson, Jonathan Reed, Steven Rodriguez, and Roy Smith.

precedents." *Tennard*, 542 U.S. at 287. The Court's decisions in *Tennard* and *Smith* simply reaffirm the Court's consistent holding that "full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a 'reasoned *moral* response to the defendant's background, character, and crime.'" *Penry I*, 492 U.S. at 328 (quoting *Franklin* v. *Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring) (plurality opinion)). Despite this Court's command that the punishment phase jury in a capital murder case must be permitted "to give '*full* consideration and *full* effect to mitigating circumstances' in choosing the defendant's appropriate sentence," *Smith*, 543 U.S. at 38 (quoting *Penry II*, 532 U.S. at 797), the Fifth Circuit has continued to apply an unconstitutionally narrow reading of *Penry I* and its progeny. While different panels of the court have created confusion by relying on varying bases for rejecting *Penry* claims, the consistency lies in the essential refusal to implement the decisions of this Court. For these reasons, the Court should grant review in these cases.

ARGUMENT

I. This Court's *Penry* Jurisprudence Requires the Punishment Phase Jury to Have a Meaningful Vehicle to Consider and Give Effect to All of a Defendant's Mitigating Evidence.

In *Penry I*, the Court sustained an as-applied challenge to the pre-1991 Texas death penalty statute brought by a defendant who presented evidence that he was mentally retarded, had been abused as a child, and consequently had "poor impulse control and an inability to learn from experience." *Penry I*, 492 U.S. at 308. The Court held that in cases where "the jury [is] unable to fully consider the mitigating evidence introduced by a defendant in answering the special issues," *id.* at 321, even if such evidence has some relevance to the special issues, see *id.* at 322, a separate issue allowing the jury to give mitigating effect to all of the

defendant's evidence in determining punishment must be submitted. *Id.* at 328.

In the years after *Penry I* was decided, the Fifth Circuit honored the decision more in the breach than in the observance. Although this Court reviewed and redressed the tests that developed in the lower courts in the wake of *Penry I*, a brief review is necessary here to set the framework for the discussion revealing the similarities in the appellate court's pre- and post-*Tennard* jurisprudence.

The primary method used to reject *Penry* claims was the "constitutional relevance" test. Under this "screening test," *Tennard*, 542 U.S. at 283, a federal habeas petitioner asserting a *Penry* claim was required to show that he suffered from a uniquely severe permanent handicap through no fault of his own and that there was a nexus between this handicap and his crime. *Tennard* v. *Cockrell*, 284 F.3d 591, 595 (5th Cir. 2002), *rev'd sub nom. Tennard* v. *Dretke*, 542 U.S. 274 (2004).[3]

Few petitioners were able to meet the erroneous standard the Fifth Circuit applied to *Penry* claims. See *Robertson*, 325 F.3d at 256 (noting that between 1992 and 2002, of the forty-seven death penalty cases in which the defendant asserted a *Penry* claim, the Fifth Circuit rejected *Penry* claims forty-six times).[4] Of the forty-six petitioners

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[3] Aggravating the damage done by the federal court, the Texas Court of Criminal Appeals followed the Fifth Circuit's lead, weighing the mitigating evidence presented by a habeas petitioner to determine whether he had presented evidence of abuse and mental impairment as severe as that suffered by Penry. See *Ex parte Smith*, 132 S.W.3d 407, 413-14 (Tex. Crim. App.) (following the Fifth Circuit's two-part "uniquely severe" and "nexus" test), *rev'd*, 543 U.S. 37 (2004); see also *Tennard*, 542 U.S. at 279 (discussing the analysis used by the Texas Court of Criminal Appeals in reviewing Tennard's state habeas petition).

[4] See also *Ex parte Tennard*, 960 S.W.2d 57, 64 (Tex. Crim. App. 1997) (en banc) (Meyers, J., concurring) (noting that "[i]n cases too numerous to mention, this Court has rejected" *Penry* claims premised on

identified in *Robertson*, 39 have been executed. See Texas Department of Criminal Justice, *Executed Offenders*, *at* http://www.tdcj.state.tx.us/stat/executedoffenders.htm (last visited July 15, 2006).

Tennard was one such case. The only evidence Tennard presented at the punishment phase of his trial was testimony from his parole officer that Tennard had a 67 IQ. *Tennard*, 542 U.S. at 277. During punishment phase closing arguments, defense counsel's primary argument was that Tennard's low intelligence and gullibility mitigated his culpability. *Id.* at 277-78. The Fifth Circuit rejected Tennard's *Penry* claim on the grounds that Tennard had failed to establish a nexus between his low intelligence and his crime and his mitigating evidence was not sufficiently similar to Penry's. *Tennard*, 284 F.3d at 597; see also *Ex parte Tennard*, 960 S.W.2d 57, 62-63 (Tex. Crim. App. 1997) (en banc).

This Court soundly rejected the restrictive screening test employed by the Fifth Circuit and held that the two statutory special issues that were submitted to Tennard's jury did not give the jury an adequate vehicle to consider and give effect to Tennard's evidence of low intelligence. *Tennard*, 542 U.S. at 287-88. This Court concluded that "the Fifth Circuit's screening test has no basis in our precedents and, indeed, is inconsistent with the standard we have adopted for relevance in the capital sentencing context," *id.* at 287, and emphatically rejected both the "uniquely severe permanent handicap" and "nexus" elements of the Fifth Circuit test. *Id.* at 289.

The Court reaffirmed that decision in *Smith*, which came to the Court after the Texas Court of Criminal Appeals ("TCCA") denied state post-conviction relief. Smith presented mitigating evidence of organic learning disabilities,

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"alcoholism/drug abuse, troubled background, and certain types of mental illness" including schizophrenia and manic depression).

speech handicaps, a 78 IQ, placement in special education classes, and his father's drug addiction, involvement in gang violence, and theft of money from other family members. *Smith*, 543 U.S. at 41. The Court noted that Smith's mitigating evidence was relevant to the appropriateness of the death penalty regardless of the severity of his mental health problems. *Id.* at 44. The Court also held that by requiring Smith to demonstrate both a severe disability and a nexus between his mitigating evidence and his crime, the TCCA had "relied on a test we never countenanced and now have unequivocally rejected." *Id.* at 45 (emphasis omitted).

Tennard and *Smith* underscore the decision made fifteen years earlier in *Penry I*. Under the standard set forth in *Penry I*, a court addressing a claim that the jury was unable to give effect to a defendant's mitigating evidence need only determine whether the jury could have believed that the mitigating evidence "diminished [the defendant's] moral culpability and made imposition of the death penalty unwarranted" but "would be unable to give effect to that conclusion." *Penry I*, 492 U.S. at 323; see also *Tennard*, 542 U.S. at 287-88. An appellate court should not substitute its judgment for that of the jury in weighing the defendant's mitigating evidence to determine whether he has presented proof of childhood abuse or mental health problems severe enough to warrant a sentence less than death. *Tennard*, 542 U.S. at 286. Instead, as long as the defendant's mitigating evidence "might serve 'as a basis for a sentence less than death,'" *id.* at 287 (quoting *Skipper* v. *South Carolina*, 476 U.S. 1, 5 (1986)), and has "mitigating dimension beyond the impact it has" on the statutory special issues, or could only be considered as an aggravating factor under those issues, a habeas petitioner is entitled to *Penry* relief.[5] *Id.* at 288.

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[5] *Amici curiae* are not suggesting that a separate mitigating instruction is required in all cases. *Johnson* v. *Texas*, 509 U.S. 350 (1993), *Franklin* v. *Lynaugh*, 487 U.S. 164 (1988) (plurality opinion), and *Jurek* v. *Texas*, 428 U.S. 262 (1976) (plurality opinion), plainly foreclose such a

II. The Fifth Circuit's Pre-*Tennard* Treatment of *Penry* Claims Limited *Penry I* to Its Facts.

In the post-*Penry I*, pre-*Tennard* era, the Fifth Circuit has consistently rejected, ignored, or misconstrued the mandate of *Penry I*. This has primarily been accomplished through the application of the "constitutional relevance" screening test soundly rejected by this Court in *Tennard*. 542 U.S. at 283 ("This test for 'constitutional relevance,' . . . appears to be applied uniformly in the Fifth Circuit to *Penry* claims."). Through the application of that unconstitutional screening test, the lower court denied relief to Texas death row inmates whose juries may not have been given an appropriate vehicle for the consideration of mitigating evidence that may have served as the basis for a sentence less than death. Attempting to characterize this Court's denials of petitions for a writ of *certiorari* as affirmations of its treatment of *Penry* claims, the Fifth Circuit neatly summarized the effects of the constitutional relevance test in *Robertson*: In the period between the lower court's decision in *Graham* v. *Collins*, 950 F.2d 1009 (5th Cir. 1992) (en banc), *aff'd*, 506 U.S. 461 (1993) (January 3, 1992) and the end of 2002, of the forty-seven cases addressed on the merits, only one—Michael Blue—was deemed to warrant relief. See *Robertson*, 325 F.3d at 256; *Blue* v. *Cockrell*, 298 F.3d 318 (5th Cir. 2002). In the period between this Court's decision in *Penry I* (June 26, 1989) and January 3, 1992, of the six cases the Fifth Circuit addressed, even peremptorily, on the merits, *Penry* relief was granted in only one, *Mayo v. Lynaugh*, 893 F.2d 683 (5th Cir. 1990).[6] In the year and a half following the

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contention. However, it is equally plain from *Penry I* and its progeny that a separate mitigating evidence instruction *is* required in some cases. The Texas legislature solved the problem in 1991 by requiring the submission of a general mitigating evidence instruction in all cases. See Tex. Code Crim. Proc. Ann. art. 37.071 § 2(e)(1) (Vernon Supp. 2005).

[6] On remand from this Court, a panel of the Fifth Circuit also granted *Penry* relief in *Graham* v. *Collins*, 896 F.2d 893 (5th Cir. 1990). On rehearing *en banc*, the Fifth Circuit vacated the panel's decision and

Robertson Court's tally, (January 1, 2003 until *Tennard*), five *Penry* claims have been addressed on their merits, with one grant of relief in *Bigby* v. *Dretke*, 402 F.3d 551 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 239 (2005).[7] Thus, of the roughly fifty-eight cases identified by the lower court and undersigned counsel where *Penry* claims were addressed on their merits, relief has been granted in a total of three cases (not counting *Graham*).[8]

While the sheer numbers are themselves notable, when combined with the recognition that the lower court has based their decisions on the uniform application of a screening test that has "no foundation in the decisions of this Court," *Tennard*, 542 U.S. at 283-84, those numbers become increasingly frightening and call for the scrutiny of this Court. Ultimately, the Fifth Circuit's pre-*Tennard Penry* jurisprudence, which refused to apply *Penry I* in any context that varied even slightly from the facts of that case, represents, at best, a significant misunderstanding of the principles on which *Penry I* was based and, at worst, an effort to affirm death sentences without regard to the requirements of the Constitution or the dictates of this Court's precedents. This trend has continued even after this Court's explicit holdings in *Tennard* and *Smith*.

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reinstated the district court's denial of relief. *Graham* v. *Collins*, 950 F.2d 1009 (5th Cir. 1992).

[7] This does not and cannot account for the cases pending in the lower court on requests for a COA or petitions for rehearing or cases pending in this Court on petitions for a writ of *certiorari*.

[8] More recently, *Penry* relief has been denied despite evidence of childhood head injuries, low IQ, and possible retardation, *Smith* v. *Cockrell*, 311 F.3d 661 (5th Cir. 2002), childhood abuse and substance addiction, *Robertson* v. *Cockrell*, 325 F.3d 243 (5th Cir. 2003), and schizophrenia, *Hernandez* v. *Johnson*, 248 F.3d 344 (5th Cir. 2001), to name a few.

III. The Fifth Circuit's Post-*Tennard* Jurisprudence Also Fails to Apply *Penry I* in a Manner Faithful to This Court's Decisions.

In narrowing the categories of evidence—both quantitatively and qualitatively—that qualified as "*Penry*" evidence in the fifteen years following *Penry I*, the Fifth Circuit and the TCCA upheld scores of death sentences using a test that has "no basis" in this Court's jurisprudence. *Tennard*, 542 U.S. at 287. Regardless of whether the Fifth Circuit's refusal to apply *Penry I* was the product of a misreading of this Court's death penalty jurisprudence or a conscious effort to reach a particular outcome regardless of the decisions of this Court, this pattern has continued in the Fifth Circuit's post-*Tennard* decisions.

Since *Tennard* the Fifth Circuit has repeatedly rejected *Penry* claims raised by petitioners with evidence of serious mental health problems and dysfunctional childhood environments by focusing on the possibility that the petitioner might receive treatment, minimizing the extent of the petitioner's mental health problems or dysfunctional upbringing, and relying on its pre-*Tennard Penry* jurisprudence, often without a critical analysis of the effect *Tennard* and *Smith* had on that body of law. See *Coble* v. *Dretke*, 444 F.3d 345 (5th Cir. 2006); *Brewer* v. *Dretke*, 442 F.3d 273 (5th Cir. 2006) (per curiam), *petition for cert. filed*, __ U.S.L.W. __ (U.S. May 30, 2006) (No. 05-11287); *Nelson* v. *Dretke*, 442 F.3d 282 (5th Cir. 2006); *Cole* v. *Dretke*, 418 F.3d 494 (5th Cir. 2005); *Draughon* v. *Dretke*, 427 F.3d 286 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1577 (2006). As with its pre-*Tennard* approach to *Penry* claims, the reasons put forward by the Fifth Circuit to explain its unwillingness to apply *Penry I* to petitioners suffering from mental health problems or raised in dysfunctional childhood environments is without basis in this Court's precedents. See *Tennard*, 542 U.S. at 287.

A second group of post-*Tennard Penry* cases that does not deal with mental health problems or dysfunctional childhood environments also highlights the narrow view the Fifth Circuit has continued to take when considering *Penry* claims. See *Jackson* v. *Dretke*, 450 F.3d 614 (5th Cir. 2006); *Summers* v. *Dretke*, 431 F.3d 861 (5th Cir. 2005), *petition for cert. filed*, __ U.S.L.W. __ (U.S. Apr. 27, 2006) (No. 05-11074); *Bower* v. *Dretke*, No. 03-40980, 2005 U.S. App. LEXIS 16891 (5th Cir. Aug. 11, 2005) (per curiam), *cert. denied*, 126 S. Ct. 1144 (2006). The narrow approach the Fifth Circuit has taken towards these petitioners' *Penry* claims demonstrates a continuing unwillingness to adhere to this Court's understanding of what the Eighth Amendment requires in capital sentencing procedures.

A. The Fifth's Circuit's Post-*Tennard* Approach to *Penry* Claims Based on Mental Health Problems or a Dysfunctional Childhood Upbringing Is Still Without a Basis in this Court's Precedents.

1. The Fifth Circuit Has Improperly Drawn a Distinction Between Treatable and Untreatable Mental Health Problems.

Nothing in this Court's analysis of *Penry* claims supports the "treatable-untreatable" distinction used by the Fifth Circuit to deny relief in the vast majority of cases. As was true in the pre-*Tennard* era, the artificial distinction the Fifth Circuit has drawn between treatable and untreatable mental health problems also ignores the fundamental mitigating thrust of this type of evidence, "'the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" *Penry I*, 492 U.S. at 319 (quoting *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). Thus, like the now defunct "constitutional relevance" test, the Fifth Circuit's "untreatability requirement" has no basis in the precedents of

this Court and is contrary to the basic principles underlying this Court's death penalty jurisprudence. See *Tennard*, 542 U.S. at 287-88.

The Fifth Circuit's distinction between treatable and untreatable mental health problems appears to have been derived from Penry's complete inability to learn from his mistakes, which necessarily would have caused the jury to view his evidence of intellectual and emotional impairment solely as aggravating. See *Cole*, 418 F.3d at 506-07 & n.54 (relying on *Penry I* to hold that because "Cole's mitigating evidence did not suggest that he was unable to learn from his mistakes," Cole's evidence of low IQ and an abusive background "fits well within the broad scope of the future dangerousness special issue"). Although the Court identified Penry's inability to learn from his mistakes as one of the reasons the pre-1991 special issues were constitutionally inadequate in his case, *Penry I*, 492 U.S. at 323-24, nothing in *Penry I*, *Tennard*, or *Smith* suggests that a petitioner's inability to learn from experience is a prerequisite for *Penry* relief. To the contrary, although Tennard, like Penry, had low intelligence, there is no suggestion in the Court's opinion that he was unable to learn from his mistakes. See *Tennard*, 542 U.S. at 277-78, 288-89. Similarly, although Smith suffered from learning disabilities and a low IQ, there was no evidence that he was completely unable to learn from his mistakes. See *Smith*, 543 U.S. at 41, 43-45. In addition, although Penry was unable to learn from his mistakes, *Penry I* contains no indication that his antisocial tendencies could not have been controlled or ameliorated by medication or counseling. See *Penry I*, 492 U.S. at 307-10.

In *Johnson* v. *Texas*, 509 U.S. 350, 369 (1993), the Court did draw a distinction between the transient nature Johnson's youth and Penry's inability to learn from his mistakes. However, neither *Tennard* nor *Smith* cited *Johnson* for the proposition that only permanent disabilities warrant *Penry* relief. In addition, youth, although indisputably relevant to

the appropriateness of the death penalty, *id.* at 367, is fundamentally different than other types of mitigating evidence. The purpose of the punishment phase of a capital murder trial is to make an "individualized assessment of the appropriateness of the death penalty" based on the "personal culpability of the criminal defendant." *Penry I*, 492 U.S. at 319. Youth, however, is a universal condition, the opposite of the "diverse frailties of humankind" that may warrant a sentence less then death based on the uniqueness of each individual defendant. See *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion). Thus, although Johnson's youth was relevant to the future dangerousness inquiry, see *Johnson*, 509 U.S. at 368, it had no other legitimate mitigating significance.[9] Because of the unusual nature of youth as a mitigating factor, *Johnson* cannot be read as creating a bright line distinction between treatable and untreatable mental illnesses. Thus, neither Penry's inability to learn from his mistakes nor *Johnson*'s discussion of the transient nature of youth provides a convincing rationale for the Fifth Circuit's approach to *Penry* claims premised on mental health problems.

Aside from having no basis in the jurisprudence of this Court, the Fifth Circuit's distinction between treatable and untreatable mental health problems would also have encouraged bizarrely inverted trial behavior. Defendants would have had an incentive to argue that they were *untreatable* psychopaths in hopes of earning a general mitigating evidence instruction. On the other hand, the prosecution would have attempted to present evidence that the defendant's mental health problems were treatable, while still contending that the defendant would pose a threat to others regardless of his prospects for treatment. The Fifth

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[9] A particular juror might have been inclined to impose a sentence less than death because of Johnson's youth solely on the basis of mercy or sympathy, but this is not an appropriate basis to refuse to impose a death sentence. See *Johnson*, 509 U.S. at 371-72.

Circuit's emphasis on treatability would have promoted this counter-intuitive, if not perverse, approach to the presentation of mitigating evidence, and it highlights a significant flaw in the Fifth Circuit's analysis of *Penry* claims premised on a petitioner's mental health problems. Because the Fifth Circuit's requirement that a habeas petitioner demonstrate that his mental health problems are not susceptible to treatment before obtaining *Penry* relief has no foundation in the decisions of this Court, the Court should grant review to remedy the lower court's systemic analytical errors in this entire class of cases.

2. *The Fifth Circuit Has Minimized the Effects of the Petitioners' Mental Health Problems and Dysfunctional Childhood Environments to Deny Relief Even Though Tennard Specifically Rejects Such an Analysis.*

In rejecting the Fifth Circuit's constitutional relevance test, this Court held that "to say that only those features and circumstances [of a defendant's character or crime] that a panel of federal appellate judges deems to be 'severe' (let alone 'uniquely severe') could have such a tendency [to mitigate the defendant's culpability] is incorrect." *Tennard*, 542 U.S. at 287. Nevertheless, the Fifth Circuit has implicitly resurrected a severity test in analyzing *Penry* claims based on mental health problems and a dysfunctional childhood environment.

For example, the Fifth Circuit rejected Coble's *Penry* claim because he failed to present evidence of the same "harsh physical abuse" to which Penry had been subjected. *Coble*, 444 F.3d at 362-63. In *Brewer*, the Fifth Circuit denied relief in part because it felt that Brewer's evidence of mental health problems was not "especially strong," even though Brewer had apparently been suicidal and had been voluntarily committed for depression only three months before his crime. *Brewer*, 442 F.3d at 275 n.1. The Fifth Circuit also denied Brewer relief based on his history of

abuse because the abuse to which Brewer was subjected did "not rise to the level of that at issue in *Penry*," even though Brewer's father hit him "'numerous' times" when he was a teenager. *Id.* at 279 n.16. Similarly, in *Nelson* the Fifth Circuit characterized Nelson's evidence that he suffered from borderline personality disorder as "trivial" and "scanty," even though it was supported by expert testimony. *Nelson*, 442 F.3d at 287. It also concluded that Nelson's abandonment by his mother was distinguishable from Penry's evidence of "severe physical abuse."[10] *Id.* at 286. In contrast, in *Bigby* the Fifth Circuit granted *Penry* relief, emphasizing that Bigby's paranoid schizophrenia was "severe, caused him to suffer delusions with respect to the actions and motivations of the people around him, . . . and significantly impacted his interpersonal relationship abilities." *Bigby*, 402 F.3d at 571. The court also noted that Bigby had even "irrationally tried to take the trial court judge hostage in the presence of armed bailiffs." *Ibid.*

The Fifth Circuit's focus on the severity of a petitioner's mental health problems and dysfunctional childhood environment and the quantity of the evidence supporting them, is inconsistent with *Tennard* and *Smith*. The gullibility Tennard demonstrated while committing a previous rape and the single IQ test that supported his claim of low intelligence,

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[10] The Fifth Circuit also denied a *Penry* claim based on "abuse as a child and 'dysfunctional upbringing'" in *Draughon* because it believed Draughon's evidence could be given effect under the future dangerousness special issue. *Draughon* v. *Dretke*, 427 F.3d 286, 298 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1577 (2006). Draughon presented evidence that his step-father "for many years viciously beat his mother and sexually assaulted his sister" and expelled Draughon from the house on several occasions when he was a teenager, forcing him to fend for himself. *Draughon* v. *Texas*, 831 S.W.2d 331, 339 (Tex. Crim. App. 1992) (en banc), *cert. denied*, 126 S. Ct. 1577 (2006). The Fifth Circuit devoted little attention or analysis to Draughon's *Penry* claim, presumably because the court had already determined that he was entitled to a new guilt-innocence trial on an unrelated ineffective assistance of counsel claim. See *Draughon*, 427 F.3d at 297.

Tennard, 542 U.S. at 277-78, could hardly be described as "especially strong." See *Brewer*, 442 F.3d at 275 n.1. Tennard's mitigating evidence, which was not supported by any expert testimony, see *Tennard*, 542 U.S. at 277, was also much weaker than the "scanty" evidence of mental illness at issue in *Nelson*. See *Nelson*, 442 F.3d at 287. Similarly, Smith's IQ, which was between 75 and 78, *Smith*, 543 U.S. at 41, was significantly higher than Penry's IQ of 50-63. *Penry I*, 492 U.S. at 307-08. Nor is there any indication that Smith's learning disabilities, *Smith*, 543 U.S. at 41, were comparable to Penry's mental health problems. See *Penry I*, 492 U.S. at 308. Smith's evidence that his father was a drug addict and a gang member who frequently stole money from other family members, *Smith*, 543 U.S. at 41, was also not nearly as horrifying as Penry's evidence of severe beatings and neglect at an early age. See *Penry I*, 492 U.S. at 308-09.[11]

Nothing in *Penry I*, *Tennard*, or *Smith* suggests that these cases were intended to set forth a minimum level of mental impairment or childhood abuse or neglect a petitioner must demonstrate before obtaining *Penry* relief. To the contrary, *Tennard* explicitly rejected the idea that federal judges should reweigh a petitioner's mitigating evidence to determine whether, in their opinion, it warrants a sentence less than death. See *Tennard*, 542 U.S. at 287. The evidence of serious mental health problems and dysfunctional childhood environments presented by the petitioners in *Coble*, *Brewer*, *Nelson*, *Cole*, and *Draughon* is hardly as trifling as evidence of the number of times a prisoner will shower. See *Tennard*, 542 U.S. at 286 (citing *Skipper*, 476

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[11] Because of the significant difference in the factual records of the respective cases, *Graham* v. *Collins*, 506 U.S. 461 (1993), is not analogous to *Coble*, *Brewer*, *Nelson*, *Cole*, and *Draughon*. For example, although Graham lived with his grandmother off and on when he was a child, he presented no evidence of physical abuse, neglect by his caretaker, or complete abandonment by his mother. See *Graham*, 506 U.S. at 464.

U.S. at 7 n.2). The Fifth Circuit's continued focus on the severity of a petitioner's mental health problems and dysfunctional childhood environment to deny *Penry* relief is inconsistent with *Tennard* and *Smith* and reminiscent of the constitutional relevance test this Court explicitly rejected.

B. The Fifth Circuit has Frequently Relied on Its Pre-*Tennard Penry* Decisions to Deny Relief, Sometimes Without Analyzing the Significant Impact *Tennard* and *Smith* had on That Body of Law.

Since *Tennard*, the Fifth Circuit has continued to rely on its pre-*Tennard* cases to reject *Penry* claims, often without a critical analysis of the effect *Tennard* and *Smith* had on its pre-*Tennard* jurisprudence. This suggests that the Fifth Circuit either remains confused as to the scope of *Penry I* and its progeny or is simply unwilling to implement this Court's mandate.[12]

For example, in *Coble*, the court acknowledged that *Tennard* and *Smith* "significantly altered our circuit's analysis of mitigating evidence offered by a defendant in a capital case." *Coble*, 444 F.3d at 358 n.11. However, the court then relied on two of its pre-*Tennard* cases, *Lucas* v. *Johnson*, 132 F.3d 1069 (5th Cir. 1998), and *Robinson* v. *Johnson*, 151 F.3d 256 (5th Cir. 1998), to hold that Coble was not entitled to *Penry* relief because his mental health problems could be treated. See *Coble*, 444 F.3d at 361-62. The court did not discuss whether *Lucas* and *Robinson* remained good law after *Tennard* and *Smith*. *Ibid.* *Nelson*, in turn, simply relied on *Coble* to reject Nelson's *Penry* claim based on his borderline personality disorder. See *Nelson*, 442 F.3d at 287. The Fifth Circuit also rejected Nelson's

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[12] The Fifth Circuit has granted a COA in two cases raising *Penry* claims specifically to consider the effect *Tennard* and *Smith* had on the court's *Penry* jurisprudence. See *Smith* v. *Dretke*, 422 F.3d 269, 287 (5th Cir. 2005); *Mines* v. *Dretke*, No. 03-11137, 2004 U.S. App. LEXIS 26259, at *30 (5th Cir. Dec. 16, 2004).

claim for relief based on maternal abandonment on the basis of *Graham* and several pre-*Tennard* cases without mentioning *Smith* or the type of dysfunctional childhood environment involved in that case.[13] See *id.* at 286. In *Brewer*, the Fifth Circuit cited *Lucas* and *Hernandez* v. *Johnson*, 248 F.3d 344 (5th Cir. 2001), for the proposition that a treatable mental illness does not require *Penry* relief. *Brewer*, 442 F.3d at 280 & n.18. The *Brewer* court dismissed *Tennard*, reasoning that *Tennard* "overturned only Fifth Circuit methodology for determining what mitigating evidence is constitutionally relevant," *id.* at 280 n.18, without addressing *Tennard*'s conclusion that Tennard's mitigating evidence, like Penry's, had a mitigating dimension beyond the deliberateness and future dangerousness special issues. See *Tennard*, 542 U.S. at 288-89. *Brewer* also failed to discuss, or even mention, *Smith*.

The Fifth Circuit's often cursory and uncritical analysis of the continuing validity of its pre-*Tennard Penry* cases suggests that the lower court continues to be confused about or is unwilling to accept *Penry I*, *Tennard*, and *Smith*. *Tennard* and *Smith* did fundamentally alter the Fifth Circuit's approach to mitigating evidence under the pre-1991 statute, a reality the Fifth Circuit seems unwilling to acknowledge. See *Smith*, 543 U.S. at 45; *Tennard*, 542 U.S. at 287-88.

C. The Fifth Circuit's Most Recent *Penry* Decision Applies a Novel Estoppel Theory to Deny Relief and Departs from the Precedents of Both This Court and the Fifth Circuit Itself.

In *Garcia* v. *Quarterman*, No. 03-11097, slip op. at 12-13 (5th Cir. July 13, 2006), the Fifth Circuit denied relief to a petitioner who asserted a *Penry* claim based on evidence of

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[13] The Fifth Circuit did briefly discuss *Tennard*. It noted that because the Fifth Circuit cases on which it relied did not use the constitutional relevance test to deny the petitioners' *Penry* claims based on childhood neglect or abandonment, those cases remained good law. See *Nelson*, 442 F.3d at 286 n.6.

numerous incidents of sexual abuse that occurred before the age of ten and untreatable psychological defects.[14] *Id.* at 10-11. However, the majority[15] denied Garcia relief because his attorney did not argue in closing that the jury should give "independent mitigating effect" to Garcia's history of sexual abuse and psychological defects beyond the scope of special issues. See *id.* at 15. Essentially, the *Garcia* majority rejected Garcia's *Penry* claim because defense counsel failed to premise his closing argument on a general mitigating evidence instruction the trial court had already refused to submit, *id.* at 27-28 (Benavides, J., dissenting), or the nullification instruction that admittedly would not have cured any constitutional defect in the special issues. *Id.* at 32-33 (Benavides, J., dissenting); see also *id.* at 19 n.13 (acknowledging that the nullification instruction would not have cured any deficiencies in the special issues). The majority's estoppel theory is completely unsupported by precedent. *Id.* at 34 (Benavides, J., dissenting) ("[T]he majority cannot cite a single authority, Supreme Court or otherwise, in support of its estoppel theory . . . .").

In addition, Garcia's psychological defects were "permanent and involuntary," *id.* at 18, and the State offered unrebutted expert testimony that Garcia would probably not respond to treatment. See *id.* at 10-11. Under the Fifth Circuit's own precedent, the untreatability of Garcia's condition would require relief. See *Bigby*, 402 F.3d at 571. Nevertheless, the Fifth Circuit concluded that Garcia's condition could not be viewed as "morally mitigating of guilt." *Garcia*, No. 03-11097, slip op. at 18. Pedophilia understandably inspires horror and loathing, but to the extent it is an involuntary condition that causes a defendant to have

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[14] Both the State and the defense expert diagnosed Garcia as a pedophile. *Garcia* v. *Quarterman*, No. 03-11097, slip op. at 12 (5th Cir. July 13, 2006).

[15] *Garcia* was authored by Chief Judge Jones, the same judge who wrote *Robertson*, which explicitly adopted the constitutional relevance test.

an "uncontrollable compulsion to commit" antisocial acts, see *ibid.*, it is mitigating, even though it does not inspire sympathy.[16] *Garcia* cannot be viewed as anything other than a results oriented decision that contravenes the precedents of both this Court and the Fifth Circuit itself.

D. The Fifth Circuit Has Also Adopted a Narrow Reading of *Tennard* and *Smith* in Other Contexts.

The Fifth Circuit has imposed a narrow interpretation of *Penry*, *Tennard*, and *Smith* on mitigating evidence other than mental health problems and a dysfunctional childhood environment. Unlike the Fifth Circuit's current approach to *Penry* claims based on mental health problems and childhood abuse, abandonment, or neglect, the Fifth Circuit's decisions in this latter class of cases applies a narrow reading of *Penry I* that is symptomatic of the lower court's reluctance to abandon its previous approach to *Penry* claims and indicates continuing refusal to follow this Court's guidance with respect to the scope of *Penry I* and its progeny.

Summers and *Bower*, for example, both dealt with evidence of the petitioners' positive character traits. Summers presented evidence of "his nonviolent nature and general good character" and "his grief for his parents' death."[17] *Summers*, 431 F.3d at 882. Bower presented evidence that "he was a good and decent family man, who up until his arrest, had never been in trouble with the law." *Bower*, 2005 U.S. App. LEXIS 16891, at *16. The Fifth

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[16] "Mitigation" and "sympathy" are not synonymous. See *Johnson*, 509 U.S. at 368, 371-72 (observing that the defendant's evidence of youth was mitigating and moving *and* that the jury should not be permitted to "dispense mercy on the basis of a sympathetic response to the defendant").

[17] Summers also presented evidence of his "ability to conform to prison life." *Summers*, 431 F.3d at 882. However, this evidence appears to be indistinguishable from the petitioner's clean prison disciplinary record in *Franklin*, 487 U.S. at 177-80, in which this Court found that the two pre-1991 special issues were constitutionally adequate.

Circuit rejected both Summers's and Bower's *Penry* claims relying principally on *Coble*, *Boyd* v. *Johnson*, 167 F.3d 907 (5th Cir. 1999), and *Barnard* v. *Collins*, 958 F.2d 634 (5th Cir. 1992). See *Summers*, 431 F.3d at 882-83; *Bower*, 2005 U.S. App. LEXIS 16891, at *16-17. *Summers* also cited *Graham* extensively. *Summers*, 431 F.3d at 883. In both cases, the court concluded that good character evidence simply shows that the defendant's crime was an atypical aberration from his normal behavior that was unlikely to recur and thus could be given adequate consideration under the future dangerousness special issue. See *id.* at 882; *Bower*, 2005 U.S. App. LEXIS 16891, at *17. The Fifth Circuit is apparently under the impression that its conclusion in these cases is consistent with *Graham*. *See Graham* v. *Collins*, 506 U.S. 461, 476-77 (1993). However, this Court has never addressed the application of *Penry I* to good character evidence outside the narrow confines of the retroactivity analysis involved in *Graham*. See *Graham*, 506 U.S. at 472.

Jackson also addressed the limits of *Penry I*. In *Jackson*, the trial court refused to allow Jackson to introduce evidence of the effect his execution would have on his friends and family. *Jackson*, 450 F.3d at 615. Without discussing *Tennard* and over a vigorous dissent by Judge Dennis, the Fifth Circuit upheld Jackson's death sentence. However, testimony from a defendant's friends and family that they value the defendant's life and would mourn his death permits an inference that the defendant had some connection to civilized society. Thus, Jackson's "execution impact" evidence, *ibid.*, was certainly admissible under *Tennard*'s broad view of relevance. See *Tennard*, 542 U.S. at 284 (holding that evidence is relevant at the punishment phase of a capital murder trial if it has "'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence'" (quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 440 (1990))). In addition,

when extensive victim impact evidence is introduced, as it was in *Jackson*, execution impact evidence may be necessary "to avoid 'unfairly weighting the scales in a capital trial'" against the defendant. *Jackson*, 450 F.3d at 621 (Dennis, J., dissenting) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 822 (1991)).

Summers, *Bower*, and *Jackson* demonstrate that the Fifth Circuit continues to struggle with *Penry I* and its progeny and the relationship of that line of cases to *Jurek* v. *Texas*, 428 U.S. 262 (1976) (plurality opinion), and the other cases from this Court that have upheld the constitutionality of the pre-1991 Texas death penalty statute. Although the number of individuals this body of law effects continues to shrink, to the inmates who were sentenced under the pre-1991 Texas death penalty statute, the proper determination of these issues remains of critical interest.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 17, 2006

(5)

No. 05-11287

Supreme Court, U.S.
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In The
Supreme Court of the United States

BRENT RAY BREWER,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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DOCKET ENTRIES

U.S. District Court
Northern District of Texas (Amarillo)
CIVIL DOCKET FOR CASE #: 2:01-cv-00112
Brewer v. Douglas Dretke, Director TDCJ-CID, et al

* * *

03/19/2001 MOTION by Brent Ray Brewer to proceed in forma pauperis (3)(uls) (Entered: 03/20/2001)

* * *

03/22/2001 ORDER granting [2-1] motion to proceed in forma pauperis and Order to Supplement. Petitioner ordered to supplement the record on or before 4/16/01 w/In Forma Pauperis Data Sheet from the institution in which he is confined, serving respondent w/copy of such data sheet. Signed by Magistrate Judge Clinton E. Averitte) Copies to counsel: 3/23/01 Page(s) 2 (uls) (Entered: 03/23/2001)

* * *

05/07/2001 PETITION for writ of habeas corpus; (19+)(uls) (Entered: 05/07/2001)

05/07/2001 MEMORANDUM by Brent Ray Brewer in support of [8-1] petition (39)(uls) (Entered: 05/07/2001)

* * *

6/28/2001 ANSWER to Complaint with Brief in Support by respondent Director of TDCJ-ID (Attorney Edward L Marshall) (45)(jeh) (Entered: 06/28/2001)

* * *

09/30/2002 FIRST AMENDED PETITION for writ of habeas corpus by a Person in State Custody "Under Protest" (66)(uls) (Entered: 10/01/2002)

* * *

06/24/2004 ORDER – Today, the US Supreme Court issued its decision in Tennard v Dretke, 2004 WL 1402731, No. 02-10038. The parties are ordered to submit a supplemental brief on the impact of the Tennard decision in Petitioner's case. The briefs must not exceed ten pages in length and must be filed by 4:00 pm, Tuesday, 7/6/04. (Signed by Judge Mary Lou Robinson on 3/24/04) (plh,) (Entered: 06/24/2004)

* * *

08/02/2004 Memorandum Opinion and Order Conditionally Granting Petition for Writ of Habeas Corpus – For each of the reasons set out (see Order), Petitioner's sixth claim for relief is granted and each of the other claims for relief is denied. A writ of habeas corpus shall issue to Respondent, vacating Petitioner's sentence and commuting it to life, unless, within 180 days from the entry of the judgment in this matter, the State of Texas grants Petitioner a new sentencing hearing or commutes his sentence to life. Judgment will be entered accordingly. (Signed by Judge Mary Lou Robinson on 8/2/04) (uls,) (Entered: 08/02/2004)

08/02/2004 JUDGMENT Ordered, Adjudged, and Decreed that a writ of habeas corpus shall issue to the Respondent, vacating Petitioner's sentence and commuting it to life, unless,

within 180 days from the entry of this judgment, the State of Texas grants Petitioner a new sentencing hearing or commutes his sentence to life. (Signed by Judge Mary Lou Robinson on 8/2/04) (uls,) (Entered: 08/02/2004)

08/16/2004 NOTICE OF APPEAL as to 51 Memorandum Opinion and Order,,, 52 Judgment, by Douglas Dretke, Director TDCJ-CID. Filing fee $ 255, receipt number 39691 (jeh,) (Entered: 08/17/2004)

* * *

DOCKET ENTRIES

US Court of Appeals for the Fifth Circuit
Court of Appeals Docket #: 04-70034
Brewer v. Dretke

* * *

11/15/04	Appellant's Brief filed by Appellant Doug Dretke. Copies of Brief: 7 # of pages: 20 Date of COS: 11/12/04 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y . [5000152-1] [04-70034] A/Pet's Brief ddl satisfied. E/Res's Brief due on 12/15/04 for Brent Ray Brewer. (mrw)

* * *

1/12/05	Appellee's Brief filed by Appellee Brent Ray Brewer. Copies of Brief: 8 # of pages: 24 Word count: 5,973 Date of COS: 1/10/05 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y . [5050655-1] [04-70034] E/Res's Brief ddl satisfied. Reply Brief due on 1/26/05 for Doug Dretke. (mrw)

* * *

1/26/05	Reply brief filed by Appellant Doug Dretke. Copies of Brief: 7 # of pages: 5 Date of COS: 1/25/05 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y. [5062327-1] [04-70034] Reply Brief ddl satisfied. , (mrw)

* * *

5/31/05	Opinion filed. Issd in T form? Y Mandate pull date is 6/21/05. [04-70034] (kgc)
5/31/05	Judgment entered and filed. [04-70034] (kgc)

* * *

6/28/05	Petition filed by Appellee Brent Ray Brewer for rehearing en banc. # of copies filed: 21 [5209434-1] Date of COS: 6/27/05 Sufficient [Y/N]: Y [04-70034] (mrw)
7/13/05	Response/opposition filed by Appellant Doug Dretke to petition for rehearing en banc [5209434-1] by Appellee Brent Ray Brewer Response/Opposition ddl satisfied. Date of COS: 7/12/05 Sufficient [Y/N]: Y [5223412-1] [04-70034] (mrw)
	* * *
3/1/06	COURT Order filed denying appellee's petition for rehearing. [5384114-1] Copies to all counsel. [04-70034] (kgc)
3/1/06	Opinion withdrawn. [5179208-1] [04-70034] (kgc)
	* * *
3/1/06	Opinion filed. Issd in T form? Y Mandate pull date is 3/22/06. [04-70034] (kgc)
3/1/06	Judgment entered and filed. [04-70034] (kgc)
	* * *

NO. 6997-A

THE STATE OF TEXAS) IN THE 47TH DISTRICT COURT
VS.) IN AND FOR
BRENT RAY BREWER) RANDALL COUNTY, TEXAS

* * *

[678] RICHARD LEPICIER,

called as a witness by the State, having been first duly sworn by the Court, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. FRISTOE:

Q. State your name for the Court, please.

A. Richard Lepicier.

Q. And Mr. Lepicier, where do you reside, please?

A. Monroe County, Mississippi.

Q. And, sir, how are you employed there, please?

A. Deputy Sheriff, Monroe County Sheriff's Department.

Q. And how long have you been in law enforcement?

[679] A. Since April of '86.

Q. All right, sir. Let me take you back to July of 1989, if you would, please, and ask if on that occasion, you had the necessity to answer a family disturbance call at the home of a William Albert Brewer.

A. Yes, sir.

Q. And are you familiar with – I think everybody calls him Albert Brewer.

A. That's the way I know him.

Q. How long have you known him?

A. Off and on for a short period of time; several months, I guess, prior to that, on several other calls in that area.

Q. All right, sir. The occasion of July the 14th of 1989, explain to the jury, please, why you were dispatched to the Brewer home, please.

A. The initial call, I believe, came from the hospital. They had dispatched an ambulance out there on a domestic disturbance. Initial report that somebody had been assaulted with a broom.

When I got out there, Mr. Brewer, Albert, was down, bleeding. He was mouthing, trying to speak, but he couldn't speak. There was blood on his shirt, there was some splatter on the wall and what-not.

Q. All right, sir. And during the course of your [680] investigation, did you obtain information as to who the assailant of Mr. Brewer was?

A. Yes, sir. Albert's wife told me that she and Mr. Brewer had an argument of some sort. I don't remember what it was about or anything, and Brent had gotten onto his father and took a broom and hit him, knocked him down and kept hitting him and kicking him and hitting him with a broom.

Q. Okay. And when you say "Brent," are you talking about Brent Brewer?

A. Yes, sir.

Q. Do you know Brent Brewer?

A. I know him from dealings with the Sheriff's Department.

Q. All right, sir. Can you recognize him?

A. Yes, sir. It's the gentleman sitting right there.

Q. All right, sir. Would you describe his clothing, please?

A. His clothing? A blue jacket, white shirt, striped tie, hair parted on the side.

MR. FRISTOE: Your Honor, let the record reflect that the witness has identified the Defendant.

THE COURT: The record may so reflect.

[681] Q. (By Mr. Fristoe) All right. Deputy, did you have reason to observe the – I think you said it was broom?

A. Yes, sir.

Q. Could you describe that broom for the jury, please?

A. Yes, sir. It was an artificial bristle broom, what I'd call an O'Cedar broom, synthetic bristle with a hard plastic case at the top of the bristles where normal broom stitching would, you know, hold one together.

Q. And what was the condition of that broom when you observed it?

A. The narrow edge of it was shattered off. There was blood on the side of the broom. It wasn't broken apart. The handle wasn't broken, but the plastic casing, the hard plastic casing at the top of the bristles was broken.

Q. All right, sir. And did you observe Albert Brewer at that scene that day?

A. Yes, sir.

Q. And could you – I know you're not a medical doctor, but can you describe the injuries that Albert Brewer suffered that day?

A. He was bleeding in the mouth. From the nose, from the side of the head. Like I said, there was blood [682] on the front of his shirt, blood on the floor, there was blood splattering on the wall. In the room – or kitchen area was a table, and he was down in front of the table area there, fairly close to the wall.

Q. All right, sir. And you said he could just mouth.

A. Yes.

Q. He couldn't say words?

A. I was thinking at the time, he probably had a broken jaw and he was, you know, moving that mouth, but he couldn't form words.

Q. And it had been related to you that he was hit again and again and again; is that what you're saying?

A. Yes, sir.

MR. BIRDSONG: I object.

THE COURT: I'll sustain.

MR. BIRDSONG: We ask the jury be instructed to disregard Mr. Fristoe's question.

THE COURT: Disregard the question of the Prosecutor.

MR. BIRDSONG: Move for mistrial.

THE COURT: Denied.

MR. FRISTOE: Your Honor, I pass the witness.

MR. BIRDSONG: State is tendering me a [683] report, for the record.

THE COURT: Very well.

CROSS-EXAMINATION

BY MR. BIRDSONG:

Q. Deputy – how do you say your last name?

A. Lepicier.

Q. You did the investigation on this?

A. Yes, sir.

Q. Is that correct? Were you the sole officer in charge?

A. Yes, sir.

Q. And you visited with Karon Brewer and Albert Brewer?

A. I don't know Mrs. Brewer's first name.

Q. Okay. You visited with the wife, Mrs. Brewer?

A. Yes.

Q. And you went out to the scene, correct?

A. Yes, sir.

Q. You also talked to Brent Brewer?

A. I don't really recall.

Q. That's fine. What I want to ask you about is – you know, I want the jury to hear the whole picture of what was happening that night.

Did you have a chance to observe Karon, Mrs. [684] Brewer?

A. Yes, sir.

Q. She was upset, was she not?

A. Yes, sir.

Q. And you had a chance to observe Brent?

A. Yes, sir.

Q. He was upset also?

A. Somewhat, yes.

Q. And you had a chance to observe the scene, correct? You had a chance to observe the scene?

A. Yes, sir.

Q. And you know that there was signs of struggle obviously, because you testified about that. Did you see broken glass? Do you remember?

A. I don't recall.

Q. Okay. Do you recall Mrs. Brewer telling you that Albert had been beating on her?

A. Yes, sir.

Q. Pretty severely?

A. I don't recall her saying that.

Q. That's fine. Let me ask you this, sir. Do you know the relationship between Brent and Karon Brewer, Mrs. Brewer?

A. I don't know for a fact, no, sir. I assume –

Q. You have an idea that she is his mother, [685] correct?

A. Yes, that was my assumption.

Q. And you talked to the Prosecutor about your knowledge of Albert Brewer, correct?

A. No.

Q. You had dealt with him on several occasions prior to this call?

A. Yes, sir.

Q. As a matter of fact, Brent came down and talked to you specifically one time with a bloody nose that was given to him by Brent (sic), correct?

A. Yes, sir.

Q. Now, what was the time frame between that time when Brent came to you with a bloody nose from Albert and this incident here? Do you remember?

A. My dealings with the family would span several months, not – you know, I couldn't recall exactly what kind of time frame it would be.

Q. Within a couple of months?

A. Uh-huh.

Q. And you have had other calls on Albert on incidents on violentness (sic) and drunkenness, correct?

A. Problems, you know, not the violence so much, the drinking. My impression of the family is that it is not a close-knit family situation. They argue and fight a [686] good bit.

Q. Albert and Mrs. Brewer argued a lot, correct?

A. On the occasions that I was called out, that was the problem.

Q. All right. And often there was alcohol involved on the part of Albert?

A. I would say every time I have had a dealing with Albert, he was drinking.

Q. And he would be what you call a violent drunk?

A. I couldn't say that, no, sir.

Q. An abusive drunk?

A. I wouldn't say that.

Q. Verbally abusive?

A. My dealings with Albert –

Q. Can you just answer that yes or no?

A. – once I arrived at the scene, he never gave me any problem.

Q. Sir, sir, can you answer that yes or no?

A. Excuse me?

Q. Can you answer that yes or no?

A. As being violent?

Q. Verbally abusive when he is drunk.

A. I would have to say I don't know.

Q. Okay. But you've answered several calls on Albert Brewer?

[687] A. True, yeah.

Q. Okay. And you said earlier that they are always alcohol-related.

MR. FRISTOE: Your Honor, is Counsel testifying, or is that a question?

THE COURT: Is this an objection?

MR. FRISTOE: Your Honor, I just didn't know whether the witness understood the question.

THE COURT: You may clarify, Mr. Birdsong.

Q. (By Mr. Birdsong) Did you understand my question, sir?

A. Repeat it, please.

Q. The altercations were alcohol-related, yes or no.

A. That would be tough to answer yes or no.

Q. Okay. Well, just do the best you can, sir. If you can't answer it yes or no, I'll try to rephrase it.

A. I can't give you a yes or no answer.

Q. Maybe you can give me a yes or no answer to this question.

You went out there and saw Mr. Brewer at the house with – struck on the head and bleeding, right?

A. Yes, sir.

Q. And I think, in Mississippi, that would be an [688] assault charge, correct?

A. Yes, sir. We only have two assaults, simple and aggravated.

Q. And this would have an aggravated assault charge, right?

A. Yes, sir, could be,

Q. Charges weren't filed, were they?

A. No, sir.

MR. BIRDSONG: Pass the witness.

REDIRECT EXAMINATION

BY MR. FRISTOE:

Q. Officer Lepicier, why weren't charges filed?

A. Domestic violence in our county – it's hard to articulate this. It's common. I'm sure it is everywhere. But our problem, or people coming to the court, an affidavit has to be signed before a Justice Court Judge. Get a Judge

up, get an affidavit signed, warrants issued, and the next morning, the same people that signed the affidavits want to withdraw the charges. This is just a very common problem.

Q. All right. So this evening that you went to the Brewer residence, Mr. Brewer was not capable of signing an affidavit or a complaint at that point, was he?

A. No, sir.

[689] MR. BIRDSONG: Your Honor, this is leading the witness. I'd object.

THE COURT: Sustained. Please don't lead.

MR. FRISTOE: I'll rephrase it, Your Honor.

Q. (By Mr. Fristoe) Was Mr. Brewer capable of signing an affidavit that night?

A. No, sir.

Q. Did he sign an affidavit that night?

A. No, sir.

Q. Was he capable of signing an affidavit the next morning?

A. No, sir.

Q. Did you go back and talk with Albert Brewer about this incident?

A. I talked to him – I talked to his wife early. She was of the opinion that Albert would not be willing to prosecute Brent for the assault.

My next meeting with Mr. Brewer, I was in the neighborhood, stopped in to see how he was doing. At that point, his speech was somewhat better. He was hard to understand. You had to listen to him closely to get his speech.

Q. And how long was this after the incident?

A. A couple of months, I suppose.

Q. He still had speech problems a couple of months [690] after?

A. If I'm remembering the time frame right.

Q. Okay.

A. At that point, he – he didn't want Brent back. He didn't want him back in the house, and to keep him away from there. I didn't feel like I could keep him from coming back out there.

At that point, or maybe at a later date, I think him and Brent had got into another argument or something. He wanted to press charges then. I explained to him that, you know, go sign the papers.

But if I remember right, Brent was over here in Texas at the time. I told him the DA probably would not pursue it, he'd waited this long to make up his mind whether or not he wanted to press charges. The DA probably wouldn't pursue the case.

Q. So, consequently, no case was ever filed; is that correct?

A. Yes, sir.

Q. Officer Lepicier, you said previously that Mr. Brewer had problems talking, you think, a couple of months after this incident; is that what you said?

MR. BIRDSONG: Your Honor, this is repetitive and bolstering. I object.

THE COURT: Overruled.

[691] A. The time frame – we're talking about an incident here that wasn't pursued that heavily, wasn't prosecuted. I remember the incident, but, you know, the time frame and stuff, I'm not that close on.

Q. Did you know whether or not Mr. Brewer went to the hospital?

A. Yes, sir.

Q. Was he hospitalized?

A. Yes, sir.

Q. For a considerable period of time?

A. Yes, sir.

Q. So it would have been after that; is that correct?

A. It would have been after that period and at the time of the next meeting with Mr. Brewer, he had problems with his hand and leg.

Q. What kind of problems with his hand and leg?

A. Muscle control. I believe, if I remember right, it was his right side, right arm and leg. He was having trouble – and trouble with his speech. He had to sort of think, forming his words and talking and not real, real bad, but he was having trouble.

Q. Did he tell you he – did he have brain damage, is that what you're telling the jury?

MR. BIRDSONG: Judge, this is leading.

[692] THE COURT: Sustained.

MR. BIRDSONG: Ask the jury be instructed to disregard.

THE COURT: Please disregard.

MR. BIRDSONG: Move for mistrial.

THE COURT: Denied.

Q. (By Mr. Fristoe) You said earlier, Deputy Lepicier, that you had been to the Brewer home on many occasions.

A. Not many. On several occasions.

Q. Okay. More than five?

A. I would say less than five.

Q. Less than five. Did you ever see Mrs. Brewer where she had been physically beaten?

A. I don't recall ever – there was never any severe bruising or swelling or, you know, busted lips or anything; some of the typical injuries you see in domestic violence. I never observed that on Mrs. Brewer.

Q. And the night of July the 14th, 1989, did you see any injuries to her that night?

A. No.

Q. Did she tell you she had been injured?

A. Her and her husband had been fighting.

Q. Was it verbal or physical? Did she let you know that?

[693] A. The furnishings in the room were pushed about. Things were on the floor. I assumed that there had been a scuffle.

Q. Well, we know there was a scuffle between Brent and the father, right?

A. Uh-huh.

Q. Okay. But you'd never seen any injuries to her that night or any other time that you had been there.

A. Not that I recall. None that would have been serious enough to stick in my mind.

Q. Okay. Did Mrs. Brewer – had she engaged in some alcoholic beverage consumption on some of those occasions that you went there?

A. I have never seen Mrs. Brewer drunk. And to recall whether I had smelled alcohol on her breath, I would be hard-pressed to say. I have never seen her intoxicated.

Q. But did you tell Mr. Birdsong earlier that Albert was not a verbally abusive drunk?

A. I can't say that. The times that I've been there, Albert has never given me any trouble. I remember one occasion, you know, taking him to jail, maybe more. He offered no resistance. He'd go on, take care of the paperwork, make bond, go on.

Q. Okay.

[694] MR. FRISTOE: I'll pass the witness, Your Honor.

RECROSS-EXAMINATION

BY MR. BIRDSONG:

Q. In your interview with Mrs. Brewer, you do know that Brent was trying to defend his mother, correct?

A. I don't know that for a fact, no, sir.

Q. Did you make any notes you can review from that?

A. Excuse me?

Q. Did you make any notes you can review about that?

A. No, sir.

MR. BIRDSONG: That's all I have, Judge.

MR. FRISTOE: I have nothing further, Your Honor. Your Honor, may this witness be excused?

MR. BIRDSONG: Yes, sir.

THE COURT: No objection. You are excused, Mr. Lepicier. Thank you.

* * *

DR. WALTER W. ECHMAN,

called as a witness by the State, having been first duly [695] sworn by the Court, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. SHERROD:

Q. Would you state your full name for the Court, please?

A. My name is Walter W. Echman.

Q. And what is your occupation, please, sir?

A. I'm a physician.

Q. And what type of physician?

A. I practice neurosurgery.

Q. And in what area?

A. I'm in Tupelo, Mississippi?

Q. And are you licensed to practice medicine in that state?

A. Yes.

Q. And how long have you been so licensed?

A. Since 1985.

Q. Okay. Now, Doctor, if you would, I want to direct your attention back to July the 15th, 1989, and ask you if you had an occasion to treat a William A. Brewer.

A. Yes.

Q. And specifically at the time you did the treatment, where was Mr. Brewer?

A. I was seeing him initially in the emergency room [696] at North Mississippi Medical Center in Tupelo, Mississippi.

Q. And as part of your examination of that patient, did you obtain a history of the incident he was placed in the hospital for?

A. Yes, sir.

Q. And briefly tell us what the circumstances were relating to injuries he received.

MR. BIRDSONG: We object to any hearsay testimony.

THE COURT: Overruled.

A. I'm reading from my admission history and physical dated July 15th, 1989, as follows: Mr. Brewer is a 40-year-old man. Apparently has had a problem in the past where he has been violent toward his wife and has beaten her up pretty badly a couple of times. The son has witnessed this and then sometime in the evening of July 14th, this patient began to be rather threatening towards his wife and the son decided to solve the problem by beating his father rather sadly with a stick, which was reportedly a broom handle.

The patient was transferred here, then, with a laceration and possible fractures about his nose and face and with a left-sided skull fracture. And there's just other information that he had had a previous heart attack [697] and no other underlying medical problems.

Q. Okay. And, Doctor, if you would, describe the specific injuries that you treated Mr. Brewer for.

A. Okay. On my examination, he showed findings of scattered small bruises around the left chest and shoulder area and down around the abdomen. He had two small lacerations of the left side of his scalp, which had been sutured. He had a large laceration wrapping around the base and right side of his nose, which had not been repaired.

He had quite a lot of blood coming from his nose. He had a little ecchymosis, which is bruising or discoloration, and swelling around the right eyelid area. His neurologic exam showed that e [sic] was reasonable [sic] alert, although he was varying a little bit at time in his level of consciousness.

He did at some times initiate voluntary movements and said occasional words. He had very limited speech. His speech tended to be repetitious. He seemed to have a little weakness of the right side of his face.

He seemed to have a little slowness of movements of his right side compared to his left side. And those are basically the abnormal findings. The rest of his exam was basically normal.

Q. Okay. And did you, in fact, have to treat him [698] for damage that he received to his brain?

A. I – at that time, he was – that same – I guess of the early morning hours, probably, I don't have the exact time on that, he was taken to he [sic] operating room, and had surgery for elevation of a compound depressed skull fracture in the left frontal temporal area, which is approximately this part of the skull, and at that time had

cleaning up or debridement of laceration of the brain and repair of the dura, which is a membrane which lines the brain.

Q. Do your records show that he had to have some other additional procedure performed on him also at a later date?

A. Well, after I completed the procedure that I did, another surgeon came in and carried out an exploration of the nose and did repair of those areas, both of the skin and I think fractures, or at least evaluated the fractures.

Q. And did your examination of that patient show that there was a tear into the brain due to the injuries?

MR. BIRDSONG: Judge, this is leading, and I object.

THE COURT: Overruled.

A. He had a laceration of the dura which was about a one centimeter laceration, which is a little less than [699] half an inch. And he had a tear into the brain with a few vessels, small vessels that were protruding out and happened to be caught in this edge of bone that was depressed.

Q. Okay. Did you also perform a CAT scan upon that individual?

A. I'm going to look for – I'm pretty certain we did, but I would have to look for the report here.

Q. Okay.

A. Yes, he had – he had actually two CAT scans or CT scans; one was July 15th of 1989, which showed this

depressed skull fracture, and he had findings of multiple facial fractures.

Q. Did you also – following surgery, did you have the opportunity to examine him for a number of days or during a period of time after the actual surgery was performed?

A. Yes.

Q. And how long was he in the hospital? Do your records reflect that?

A. Yes. He was discharged on July 27th, 1989.

Q. Okay. And just before his discharge, did you examine him at that time?

A. Well, I saw him throughout the time in the hospital, and basically I observed him during that time. [700] I didn't do a more detailed exam, probably at the time of discharge, but observed him during the time he was in the hospital.

Q. As a result of the injuries, before his release, did you notice any kind of muscle weakness to the right side of his body?

A. Yes. I think the records indicated that e [sic] had a little bit of weakness and a little bit of persisting difficulty with his feet for a period of time, I think that even continued as an outpatient – on his outpatient follow-up for a short time.

He did – my notes say his neurologic progress came along very nicely with gradual improvement of right-sided motor function and slow gradual improvement of his

speech. So these functions were all improving as he was observed in the hospital.

Q. And the last time you would have observed him should have been July the 27th, 1989; would that be correct, Doctor?

A. Well, no, that's correct for the hospital, but I saw him in the office on two occasions following that.

Q. And when was the last time that you examined that particular patient have been?

A. I saw him on October 11th, 1989.

Q. And do your notes reflect that he was suffering [701] from any kind of injuries as a result or damage as a result of his previous injuries at that time?

A. Okay. He came back a little earlier than his scheduled visit because he wanted a slip to return to work at that point. My note says he was doing well clinically. He has good use of his right foot, no problem with his right arm. His speech is much better. Those were basically the findings I examined.

Q. Okay.

MR. SHERROD: Doctor, I thank you. I pass the witness.

MR. BIRDSONG: May I be furnished a copy of this?

MR. FRISTOE: I don't have his records.

MR. BIRDSONG: Judge, could I have a copy of those to review the notes he reviewed before?

MR. SHERROD: Your Honor, with he [sic] understanding that if he needs a copy of any of that, we would be happy to get a copy.

THE WITNESS: You can have this.

MR. SHERROD: Will that be okay?

MR. BIRDSONG: Thank you, sir.

[702] CROSS-EXAMINATION

BY MR. BIRDSONG:

Q. Dr. Echman, you had a chance to see a medical history of this patient of yours, correct?

A. Well, you mean before –

Q. Yeah, of any prior injuries he might ave [sic] had.

A. No.

Q. You never did?

A. All I have is what's – that's my history. Well, the first – I can show you – if I can show you on the document, I'll show you what is my history.

Q. You don't have to testify about it. Just show me where it is.

A. Okay. These are follow – up notes. This is the front sheet from the hospital chart. That's the discharge summary, where he was discharged, and those are the notes, including diagnosis. This is my history when I first saw him.

Q. You got this verbally?

A. That is my history. Well, I got it from somebody, and I can't tell you exactly how I got it, but that is – you know, possibly from several people, but that's oftentimes how things occur in the emergency room. You get little bits of information from several people, usually.

[703] Q. I've got a couple of questions I want to ask you about your report here. Before I get into that, though, what I want to make sure is that I understand that you do not have any other information from other doctors that have treated Mr. Brewer before; is that correct?

A. That's correct.

Q. You did not know he had prior head injuries?

A. This patient?

Q. This patient.

A. William Brewer. No.

Q. You did not know he had prior leg injuries?

A. No, unless its written there in that –

Q. Okay.

A. – bit of information.

Q. You have a note in here, a follow-up deal on July 26th, where the patient related to you that he wanted to get out and commit a murder. Do you remember that note?

A. Could I see it? Because what you have may not be on my information.

Q. This part right here.

A. These are records from the hospital, and there's a –

Q. What I would like to be able to do is ask you questions about those notes. Is that your note?

[704] A. No, that's not mine.

Q. Let me –

A. Let me talk to you all so you'll know that this is. There's also a handwritten note in here which is almost illegible by – this is a psychiatrist that works in Tupelo.

Q. Let me ask you about these, and you can try to help me out. Okay? Dr. Echman, we're looking at a report from attending physicians, stated W. Echman, correct?

A. Well, that's –

Q. Yes or no.

A. Well, that's not quite the way it's written. That form, it says "from attending physician." What it means it [sic] that's who the consult was requested form [sic]. The actual –

Q. Okay. Let me ask you this.

A. – consultation was provided by Dr. Golf.

Q. On 7-26-89.

A. Right.

Q. And these records are what you read prior to testifying today, correct? Yes or no. Did you read any of this?

A. I don't think so. no. Well, I mean, I've seen bits of that. I haven't read it in detail.

Q. Well, let me ask you this. Does this say right [705] here –

MR. SHERROD: Now, Your Honor, if I may, Mr. Birdsong is trying to get in inadmissible evidence by asking this man to read a record he didn't make an entry into, we don't know who made the statement, and now Mr. Birdsong wants to ask him a question in the form of a statement to this jury. We would object to the statement – or to the question and the statement.

THE COURT: Sustained.

MR. BIRDSONG: No questions, Judge.

MR. SHERROD: Your Honor, may this witness be released. He's got to catch a plane.

THE COURT: Any objection?

MR. BIRDSONG: No.

THE COURT: You may be excused.

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[755] CHINA LONG,

called as a witness by the Defendant, having been first duly sworn by the Court, testified upon her oath as follows:

DIRECT EXAMINATION

BY MR. DAFFERN:

Q. Would you state your name, please, Your Honor?

A. My name is China Long.

Q. And are you Judge China Long?

A. I'm a Justice of the Peace, yes.

Q. And where is that, please, ma'am?

A. In Big Spring, which is Howard County. I'm Justice of the Peace of Howard County.

Q. And how long have you been Justice of the Peace [756] there?

A. For six year. I was elected for a term beginning in 1985.

Q. Okay. Judge, I want to show you a document that has been marked as Defendant's Exhibit No. 5 and ask if you would look through that, please.

A. (Witness complies.)

Q. Have you had occasion to go through what has been marked Defendant's No. 5, Your Honor?

A. Yes, I have.

Q. Okay. Are you familiar with that document?

A. Yes. I have seen that document – this particular document before, yes.

Q. Okay. Are you the China Long that is listed in that document as justice of the Peace, Precinct 1, Place 1, in Howard County?

A. Yes.

Q. Okay. Do you know a Brent Ray Brewer?

A. I have had occasion to meet him, yes.

Q. Okay. Do you see him in the courtroom today, Judge?

A. Yes, I do.

Q. Would you point him out, please, for the jury?

A. He's the individual in the dark suit not wearing glasses.

[757] Q. Okay. Did you have occasion, Judge – was he the Brent Ray Brewer that Defendant's Exhibit No. 5 refers to?

A. Yes, sir. He looked a little bit different at the time that I saw him.

Q. All right. Let me – Judge, I show you what's in evidence and marked as State's Exhibit No. 104. Would you look at that document, please? Have you had a chance to see that?

A. Yes, I have.

Q. Can you identify the person in that document, Judge?

A. Yes.

Q. Who is that, please?

A. That is Brent Brewer.

Q. Does he resemble the Brent Brewer you knew more in this picture right here?

A. Yes.

Q. Okay.

MR. DAFFERN: We will tender into evidence, Judge, what's been marked as Defendant's No. 5 at this time.

MR. SHERROD: We don't have any objection, Your Honor.

THE COURT: Defendant's Exhibit 5 is [758] admitted.

MR. DAFFERN: Thank you.

Q. (By Mr. Daffern) Judge, I would ask you to go over, if you would, please, other than the first page of this document. Do you know a Margaret Ray?

A. Yes. Margaret Ray is the County Clerk in Howard County.

Q. Okay. Would you go over that document and just briefly explain what each page of that document is for the jury, please, Your Honor.

A. The first page here is an Application for a Court Ordered Mental Health Services on Brent Ray Brewer. This is the beginning of paperwork to put this man in the Big Spring State Hospital mental facility for evaluation.

This is against his will. It is a Court order. We must notify the individual that e [sic] is entitled to have a

hearing within 72 hours after he is committed under a Court order. He was notified.

There is also an Order of Probable Cause Hearing saying that he's going to have his 72-hour hearing. And I signed that piece of paper.

There is a Physician's Certificate of Medical Examination for Mental Illness indicating that there was an examining physician who did examine Mr. Brewer.

And there is an order that I signed after [759] talking with him, after reviewing the – whatever evidence that Big Spring State Hospital people were able to bring to the hearing to indicate that he did need to have further hospitalization at the Big Spring State Hospital.

And then there is an indication here that he did sign. After the hearing with me – I ordered that he be kept at the Big Spring State Hospital for up to 14 days.

After he had the hearing with me for that 14 days, he did sign voluntary papers stating that he had signed a request for voluntary admission.

And then, let's see. There is an order signed here by the Howard County Judge in that Mr. Jack Dempsey had come in and asked to see these records. Is that what you wanted me to say –

Q. Yes.

A. – about this?

Q. That's fine. Thank you very much, Your Honor. We would pass the witness.

CROSS-EXAMINATION

BY MR. SHERROD:

Q. Ma'am, just a couple of questions. First of all, for a person to be committed on a voluntary commitment – I believe that's what you said.

A. Yes.

[760] Q. What is involved in that?

A. Well, he just goes to the people at the Big Spring State Hospital and requests that he be committed on a voluntary basis.

Q. Okay. And is that kind of the procedure that was followed in this case?

A. No. He was committed the first time on a Court order.

Q. What happened in a Court-ordered hearing?

A. The person is detained, based on an application from a reputable person. For various and sundry reasons, he's detained, he's taken to the Big Spring State Hospital against his will, and he is examined there by a physician, psychiatric people, case workers.

Q. And if I wanted to have this little lady here committed down in your county, what would I have to do to have her committed?

A. You would come into the – generally, these are handled through our county attorney's office, come in and make a sworn statement that you feel that this person is a danger to himself or others.

Q. And if I just swear out that affidavit, she's gone; is that right?

A. Well, there is a requirement for a physician's examination of that person.

[761] Q. And usually, what does that physician base his opinion on?

A. I don't know. I'm not that physician.

Q. Do you think he goes into the background of the individual or just talks to the individual himself?

A. I'm not sure. I really can't answer that.

Q. What usually happens in your county?

A. What usually happens in my county is that a person who comes in and is a valid – I'm sure there are safeguards as far as just someone jumping up and having someone ordered committed.

If it sounds like a valid request and then a physician's examination – I don't know what that physician exactly does. But he does see the individual.

Q. Okay. And could that be for drug use?

A. Possibly so, yes.

Q. Alcoholism?

A. Yes.

Q. Suicide?

A. Yes, definitely.

Q. If this little girl here told me one time that she was thinking of suicide, would that be enough to – off she goes?

A. No.

Q. Okay. What would be the problem?

[762] A. I think there would have to be a serious – well, it would be considered a serious threat of suicide.

Q. And what constitutes a serious threat?

A. For many people, it's just the fact that this person has said that he will commit suicide and has done something to indicate that he would do it, perhaps a gesture, perhaps a note, perhaps an attempt.

Q. Okay. So, if this lady right here told me she was going to commit suicide and happened to write it down, off she goes?

A. Possibly.

Q. So that note, then, can make a difference; is that correct?

A. Yes, I think it could. I think it would add evidence.

Q. And again, you don't have any idea whether this is something that there's a legal basis for, if a person agrees to it; is that correct?

A. Well, if a person agrees to it, I don't see that person generally.

Q. Right. In other words, if he just says, yes, and 30 day or 20 days down here might do me some good, then there's no contested issue on that?

A. I don't see people that way, no. I see people who have been admitted against their will.

[763] Q. Okay. And, of course, you didn't hear any evidence to speak of in this case?

A. The only evidence I heard was that the man had made a suicide – a suicide note to his family. His family was concerned about his mental state.

And he could possibly be – after hearing from the person's social worker, I decided that he could be a threat to himself in this case because of the suicide.

Q. Was he working at that time?

A. I don't think so.

Q. Would that have been important to you?

A. I generally do ask people if they do have a job, and what they are doing. On a suicide attempt, I take that seriously.

Q. And do you remember whether this Defendant was working at that time?

A. No, I don't.

Q. Was he living with his folks?

A. As I understand, it was members of his family who had asked for him to be committed.

Q. But do you know whether he was living at home or living with someone else?

A. No. No, I don't.

Q. Okay. And as far as that goes, you don't know who wrote the suicide note, do you?

[764] A. No.

Q. Okay. Did you make any inquiry as to whether a member of the family may have signed the note?

A. The suicide note?

Q. Uh-huh.

A. I don't recall.

Q. In other words, if someone was having a pretty bad drug problem, and you had basically told them, well, we have to have something to support this accusation, I guess like you said. We just don't what [sic] you to come in and tell me that he said he was going to kill himself, and off he goes again.

But you don't really inquire as to whether or not that's his note. You didn't in this case?

A. No.

Q. Okay. Do you remember talking to him that much?

A. I don't remember that much about the conversation.

Q. And specifically when would that have been?

A. In January of 1990.

Q. Okay. And you don't know anything about what happened after that period of time.

A. No, I don't.

Q. Just that he did agree to go?

A. Just that – I, in fact, said, "I think you [765] should stay at the Big Spring State Hospital for up to 14 days," and I signed the order.

Q. Okay.

A. Many times, the hospital will release people during that 14 – day period. Or if they sign a voluntary commitment, then we don't see them anymore, and I don't see them anymore, period. The County Judge does any other court proceedings that are held.

Q. This particular case was a voluntary commitment, basically?

A. I understood that. After I saw him, he did say that he wanted to stay and sign the voluntary commitment.

Q. Okay. You weren't concerned that he didn't know what he was doing at the time he agree [sic] do [sic] stay there, then?

A. I had seen him at the 72-hour probable cause hearing, and based on what I heard, I felt he needed to stay for up to two more weeks.

Q. I guess my point is, you felt that he was aware of what was going on and competent enough to make a decision to waive any hearings?

A. Well, the waiving of the hearing came after I saw him.

Q. Okay. You didn't have any concern about him volunteering to go, then?

[766] A. He did not volunteer in my presence. At the time I saw him, I thought that I was signing an order, and I did sign an order saying that he would stay for up to 14 days. Any further Court order is then signed by the County Judge in our county.

Q. Okay. All right, ma'am. I thank you.

MR. SHERROD: That's all I have, Your Honor.

MR. DAFFERN: I have no further questions for the Judge. May she be excused?

THE COURT: Thank you. You may step down. There is no objection. You may be excused.

* * *

[768] ALBERT BREWER,

called as a witness by the Defendant, having been first duly sworn by the Court, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. BIRDSONG:

Q. Albert, would you state your full name for the jury, please?

A. William Albert Brewer.

Q. Do you know Brent Brewer?

A. Yes, sir.

Q. How do you know him?

A. He's my son.

Q. Albert, I want to visit with you about Brent and the raising of him. Before I get into that, though, I want to talk with you about where you live. Where do you live right now?

A. Hamilton, Mississippi.

Q. How long have you lived there?

A. Five, six years.

[769] Q. Are you a working man?

A. Yes, sir.

Q. Where do you work?

A. I work for Preston *Dopp* Truck Company. I drive a truck.

Q. Are you married?

A. Yes, sir.

Q. Who are you married to?

A. Karon Brewer.

Q. Is that Brent's mom?

A. Yes, sir.

Q. Have you been in the military, sir?

A. Yes, sir. Twelve years.

Q. Did you serve in Vietnam?

A. Yes, sir. I served three months.

Q. Did you see combat there?

A. Yes, sir.

Q. Give the jury a brief rundown of what you had to do in Vietnam.

A. I was in the long range alert, which is better known as suicide squad. And I've been shot twice, and we worked in six-men teams, and I was a team leader. And my team had the highest body count in the battalion of the 101st Airborne. I was over there a long time.

Q. Were you decorated?

[770] A. Yes, sir. About every metal you can get, but all of them won't get me cup of coffee, you know. I've got a bronze star with a clover leaf, a silver star, stuff like that.

Q. How old were you when you got married?

A. I'd just got back from Nam after one year there, and I was 19 when I got back. I got married the following month. I turned 20 on the 7th of October, got married on the 24th of October. I was 20.

Q. When was Brent born?

A. Well, we had split up at the time we found out she was pregnant.

Q. You and Karon?

A. Yes, sir.

Q. Were you there when he was born?

A. No, sir, I was in Germany.

Q. When was the first time you were able to see your son, Brent Brewer?

A. About five months old.

Q. When he was five months old?

A. Yes, sir.

Q. How long did you get to see him?

A. Well, I was on a 30-day leave, and they extended it to another 30 days. And I went on to Vietnam for the second time.

[771] Q. How long were you in Vietnam on this tour?

A. Twelve months, plus six.

Q. Is that when you got wounded?

A. I was wounded the first time and the second time. I got shot through the legs and the head.

Q. In the head?

A. Yes, sir.

Q. Albert, how old was Brent when you saw him the second time?

A. Briefly, about five years old, four and a half.

Q. How long did you get to see him that time?

A. My mother died, and I was home on leave, and I run out there for about two days.

Q. At this time, were you divorced from Karon Brewer?

A. Yes, sir.

Q. She was remarried by that time?

A. Yes, sir.

Q. Did you get to see Brent Brewer any other time after this – after you saw him when he was five years old at the funeral of your mother?

A. No. He wasn't at the funeral. We done buried my mother, and I come out here to see him. But the next time I saw him, he was 15 years old.

Q. Had you kept in contact with him at all during [772] that time?

A. No, sir.

Q. What were you doing at the time when you saw him when he was 15 years old?

A. I was driving a truck, and I came through Dallas, Cedar Hill.

Q. How did you know where he lived?

A. Well, I have talked to his mother during the years, but I didn't see him – Brent, you know, in that time.

Q. When you saw him at that time, tell the jury about how you arranged to meet him and what happened.

A. Well, I stopped below their house where they were living in Cedar Hill about 15 miles, and I called Karon and told her where I was at, at the – like a Junior Food Mart or a store that had a pull-off.

And she said, "I'll bring him down to meet you." I think a friend of his brought him down to meet me, put

him out, we got in the truck. And from right there – I bought some beer and he pulled out some grass out of his pocket, and my first meeting, I wasn't going to just tell him, "put it up," you know, or be a hard daddy to him.

I was just seeing how he was raised and what he was used to. And I watched him smoke that joint and it told me the way he smoked it, he'd been doing it a long [773] time. It wasn't a first time thing. And we just talked and got messed up together.

Q. Now, Albert, did he drink beer with you, too?

A. Yes, sir.

Q. And that was the beer you bought?

A. Yes, sir.

Q. Do you have a substance abuse problem?

A. Not now, but I used to, yes. In Vietnam, I sold it and my habit – I went to the hospital to get off of it. My habit, they said, was equivalent to $1550-a-day habit in America.

And I went in the hospital and got off of it. But at the time, see, I got off of one crutch onto another. And I got off the dope or heroin and I switched to booze. And that's the same poison, you know.

And I used to buy half a gallon of vodka and drink it out of the bottle, you know.

Q. Okay. Albert, did Brent have an occasion to go live with you?

A. Yes, sir.

Q. When was this?

A. I don't know what years. And when me and Karon got married, we got together.

Q. Did he live with you before you and Karon got married?

[774] A. A short time, not long. He just stayed the summer, like.

Q. Where was this at?

A. Mississippi, Hamilton.

Q. All right. Did you have any other children that Brent had to meet?

A. Yes, sir, I did, one. My son, his half-brother.

Q. Okay. What's his name?

A. Israel Brewer.

Q. How did Brent and Israel get along?

A. Oh, outward, you know, they got along real good. But inward, I see the affection I showed my little son, it hurt Brent inside, but he didn't show it. But it was there, I could feel it.

And I felt bad, because I didn't show him – I wasn't around to show him the affection I showed my little son there.

And he resented that, and other than the resent, because it hurt, you know. And I saw that, and it was my fault, and I couldn't – I didn't know how to correct it.

Q. Okay. Were you drinking at this time?

A. Yes, sir.

Q. Did you have occasion to he pretty harsh with Brent and Israel?

A. Yes, sir.

[775] Q. Tell the jury what you did that was harsh.

A. I did what?

Q. Tell the jury what you did that was harsh with Brent.

A. Well, like I said, I was sergeant in the Army, and I was saddled with a 15-year-old kid, and I was used to having people do what I say do when I say do it. And I'm sure I threatened him like a military. I was hard on him, you know, and if he didn't do it, I threatened him with physical.

Q. Did you get physically violent with him?

A. Yes, sir, I did.

Q. At some point in time, you and Karon got back together, correct?

A. Yes, sir.

Q. And did she move back to Mississippi with you?

A. Yes, sir.

Q. Okay. And that was to Hamilton?

A. Yes, sir.

Q. Tell the jury how big a town Hamilton is.

A. We don't have a red light. We've just got one service station, a little grocery store, and a little eating place, and at the most, 300 people; you know, a small place, real small.

Q. When you and Karon got back together, how would [776] you describe your relationship to Brent's mother?

A. Well, good – you know, when it's good, it's good, But I've got a lot of problems, and when I was violent or things didn't go my way, I get violent, you know.

Q. Did you beat Karon up?

A. Yes, sir.

Q. Did she have to call the police on you sometimes?

A. Yes, sir.

Q. Was Brent around when that happened?

A. Yes, sir,

Q. Did you and Brent have fights about that?

A. Yes, sir. Well, it wasn't me and Brent having fights. Me and her had fights, and he loved both of us, and he was drawn two different directions, and he got between.

But then, I just got mad at him, too, you know, and that's what started it.

Q. Okay. Tell the jury what you told Brent when he would get between the two of you.

A. "If your ever draw your hand back, you'd better kill me, because I'll kill you."

Q. You told your son that?

A. Yes, sir.

[777] Q. Do you know Deputy Lepicier?

A. Yes, sir. I know him, but not personally, but I know him.

Q. Has he taken you to jail before?

A. Yes, sir.

Q. Has he come out and talked to you and arrested you after you hit Brent before?

A. Yes, sir.

Q. There was an occasion – did you see Deputy Lepicier here today?

A. Yes, sir. When I walked in, he was sitting in the break room, but I just walked in and walked back out and went to the latrine.

Q. Was there ever an occasion when you had to go to the hospital because you were hit by Brent?'

A. Yes, but I deserved it.

Q. Tell the jury what happened that night.

A. Well, it started off, my wife – I had a check account and put my wife on it. She took my name off of it. I come in there, and I got her check, and Brent went with me around, and I was talking to Brent this whole time that – what I ought to do to her, you know, physically.

And I got back and I started a verbal argument and the more I argued, the madder I got – became. And I picked up a chair and threw it at her.

[778] And Brent hollered at me to stop, but I just told him, you'd better get your a-s-s out the door, or I'll do it to you, too.

And I heard him say something else, like, you want me to stop, but I went towards her, went towards her and that's when he hit me. I had it coming, you know.

Q. Albert, were you in the hospital for a while?

A. Yes, sir.

Q. Do you remember telling one of your doctors that you were going to commit murder to the person that beat you up?

A. Yes, sir.

Q. Albert, have you been diagnosed with post-traumatic stress syndrome?

A. Yes, sir. I was arrested at one time other than that, and it took two police officers to bring me in. And then only when I wanted to, and they knew it.

And I had a Buck knife on my belt, and he wanted to take it off, and I just back-handed him onto the ground. And in Mississippi, its automatic two years if you strike a cop. And they said I do the two years or go to the crazy house, you know. I don't know what you call it.

I just volunteered to go down there and be checked out by a psych. They put me through everything, [779] checked me for a tumor and he said I had that post –

anyway, deep, deep depression due to Vietnam. And he didn't want to release me to go back home unless I checked in with a psychiatrist up home and followed through on what he had diagnosed, because he said he didn't want to be responsible if I went back up there and killed somebody.

I went back up there and tried to go through with that psych, and that psych just wanted to put me in AA. And I asked him did he think by putting me in AA, I would become out from under him totally. So, I did that. I didn't go to AA and I didn't follow through with the treatment.

Q. Do you know – well, you didn't know how Brent's stepfather treated him, because you didn't see him, right?

A. I didn't know, but I just heard he ignored him, you know. But I didn't know.

MR. BIRDSONG: Judge, I'll pass the witness"

CROSS-EXAMINATION

BY MR. SHERROD:

Q. Just a couple of questions, please, sir. How many times have you seen the Defendant since he's been in jail?

[780] A. Since he's been in jail out here?

Q. Yeah.

A. I think twice.

Q. Okay. And over what period of time?

A. About a year.

Q. Okay. You actually came back and went out and talked to some people about the facts of this case, didn't you?

A. When I come out and visited him before?

Q. Yeah.

A. We were trying to find out the truth, because we didn't believe he could do this.

Q. Okay. Let me ask you: You indicated that he loved his mother; is that correct?

A. I still do, yes, sir.

Q. And loved you; is that true?

A. Yes, sir.

Q. But he almost beat you to death?

A. Well, he loves his mother, too.

Q. But he almost beat you to death.

A. Well, I told him if he ever draw a hand back at me, he'd better kill me. He knows – I've had four and a half years karate. He knows what I've been through, and he believed me. And I don't blame him for that, no, sir.

Q. Did you ever want to file charges on him?

[781] A. No, sir.

Q. You never talked to the officer later or sometime –

A. The officer come out to my house, wanting to file charges on him. I said no. They wanted me to do it, they did. But I wouldn't.

Q. Did you go back to them later and ask to file charges?

A. No, sir.

Q. You never talked to the officer about wanting to file charges where he instructed you that the District Attorney would not file, because it had been too long?

A. Oh, no, sir. He came out to the house, two car loads of them, and come into my living room and sat down and tried to get me to do it. He told me, I guarantee you he'll get two years.

I wish I had of, because he wouldn't be in this shape now, but I didn't never want to press charges.

Q. A lot of violence with him when he was beating – a lot of violence with him when he was beating you?

A. When he was beating me?

Q. Yeah.

A. How violent can you get when you are beating somebody, you know?

Q. That's what I want to know. What injuries did [782] you have?

A. He hit me in the head, and it just knocked me out right there, but –

Q. Did it break your nose?

A. – I got shot in the head right here. They told me if I ever get hit in the head, it could kill me.

Q. Did you tell him that?

A. No, I didn't,

Q. He didn't know that?

A. He knew I was shot in the head. I ain't going to walk around and tell anybody I might die if I get hit in the head. I wouldn't get a job.

Q. You had heart surgery prior to that time?

A. No, sir. I had a heart attack.

Q. Okay, You had a heart attack prior to he time that he hit you in the head?

A. Yes, sir.

Q. Did he hit you just one time?

A. That – more than that, but that's the one I remember, that's all. I don't remember hitting, no.

Q. In other words, after the first time he hit you, he knocked you unconscious and then he beat you and beat you and beat you after that; is that correct?

A. I don't know. I don't remember it. But I know I didn't fall down. I was on my knees, but I didn't [783] fall. He was trying to kick me off my feet, down, but he didn't.

Q. Do you remember all of it, sir, or did the first – did the first hit knock you unconscious, as you said?

A. I don't remember. After the first lick, I went to my knees, then I started to remember. I was on my knees, and Karon was over there wiping blood, and I saw Brent standing there with tears in his eyes.

Q. Did you have other wounds on you?

A. Just right here and here.

Q. Your jaw was broken?

A. They said it was.

Q. Your skull –

A. But they said, too, that when they got in there, they found another bone that had been broke for years from military. They had – they said they had to put it back together. That way they had to wire my jaw, too, because that bone never healed all these years.

Q. One of the bones in your skull when Brent hit you went into your brain, didn't it?

A. Over here.

Q. Uh-huh.

A. I don't know.

Q. Did you have any paralysis after those injuries?

[784] A. No more than expected. It come back, you know.

Q. When did he leave the house?

A. While I was in the hospital.

Q. And was he there when you got out?

A. No, sir.

Q. Did you forgive him?

A. Yes, sir, totally.

Q. But he didn't want to be around the house?

A. Well, like I said before, he knew what I'd said, and he was scared that I would hold something against him when I got out.

Q. Was he afraid that you would kill his mother?

A. Maybe he or – his mother or him. I don't know which – I can't think for him, but I know he was scared for himself. He wanted to get out of that, because he knew me.

Q. His mother was still living with you, correct?

A. Right.

Q. She stayed with you after that, correct?

A. A short time, yes.

Q. After that injury, when was the next time you saw him?

A. I talked to him on the phone.

Q. When?

A. When he got in the halfway house. I found out [785] and got in touch with him.

Q. You talked to him one time?

A. No, three or four times.

Q. When was the next time you saw him?

A. Even Kristie talked to me in the phone.

Q. When was the next time you saw him?

A. Next time? He was in jail here.

Q. Okay.

A. Can I add something, though?

Q. If I may, sir, let me ask you this: You indicated he was in a halfway house?

A. Well, I guess that's what it is.

Q. Is that in Big Spring?

A. Right, yes, sir.

Q. For narcotics abuse?

A. Yes, sir. As far as I know. I don't know the place, but that's what I heard he was in there for. He turned himself in for that.

Q. And is that where he met Kristie Nystrom?

A. Yes, sir. As far as I know, yes. And I would talk to him, and he said, "I've got somebody I want you to say hello to, a girl." And I said, "Brent, I don't know her." And he said he insisted that I say hello, but she couldn't – too, the phone and I said hello, she just said hello and goodbye and that's all I said to her.

[786] Q. And he was being held for counseling for drug abuse at that time?

A. Well, he turned himself in. I guess he was held. May I add something?

Q. Sure.

A. After what happened, I know for a fact that what Brent did to me, which I deserved, and I probably deserved killing, but it tore him up mentally, you know. How can a kid do that to his daddy and walk around and not be

tore up inside. I know he was. I could tell the way he talked. He apologized over and over.

Q. The next time you saw him, he was in jail.

A. Yes, sir.

Q. And that was on the murder charge?

A. Yes, sir.

Q. Brent have a lot of self-pity for himself?

A. I don't think it's self-pity. He got a raw deal, and I started the whole ball rolling.

Q. Would it be your opinion he's always had raw deals?

A. He didn't have a daddy.

Q. So, if he goes out and commits murder or whatever he does, he's not responsible for it for the rest of his life?

A. No, I'm not saying that. No.

[767] Q. I mean that justified to everyone, if you have a bad daddy, why a person would stab an individual three times in the neck for $140?

A. I wouldn't say – he's feeling sorry for himself, though, this ain't – my mother and daddy separated when I was three. I didn't kill nobody on the street, you know.

Q. Let me ask you this: A person sits in the courtroom and hears about a man begging for his life as he stabs him in the throat, "Boy, don't kill, me. Boy, don't kill me," and the only time you hear any sniffles or any cries is

when his dad is on the stand testifying for him. What does that show you?

A. I don't know that he said that. I wasn't there.

Q. Did you beat your wife real bad when you were living with her?

A. At times, yes, sir.

Q. On this particular occasion when he almost killed you, or put a bone fragment into your brain, was she bloody, have a busted lip?

A. I don't remember. I was throwing chairs in a rage. I don't – when I do that, I don't know what –

Q. Did you hit her?

A. I imagine I did, because she ducked one time, and – I threw two chairs, I know.

[788] Q. Was she bruised?

A. I started around the table towards her. That's all I remember.

Q. Were you going to kill her?

A. I didn't intend to kill her, but to get my hands on her, I don't know.

Q. Had you tried to kill her before?

A. No, I ain't tried to kill her. Beat her, yes, maybe.

Q. Put her in the hospital before?

A. No, sir.

Q. Have you had police officers out where they could see swollen eyes, broken noses, anything like that before?

A. Yes, sir.

Q. Which officers?

A. Well, it was a long time ago. That was – I don't remember the names. It was back in the sixties.

Q. Do you have a problem controlling your temper, too?

A. I used to.

Q. But no more?

A. No, sir.

MR. SHERROD: I'll pass the witness. Thank you, Mr. Brewer.

[789] MR. BIRDSONG: Nothing further, Your Honor.

THE COURT: You may step down, Mr. Brewer. Thank you.

* * *

[817] KARON BREWER,

called as a witness by the Defendant, having been first duly sworn by the Court, testified upon her oath as follows:

DIRECT EXAMINATION

Q. State your name, please, ma'am.

A. Karon Brewer.

Q. Karon, do you know Brent Brewer?

A. Yes, I do.

Q. How do you know him?

A. He's my son.

Q. Karon, do you understand what the jury has found Brent guilty of as of yesterday?

A. Yes.

Q. I want to visit with you about Brent, him growing up with you. I want to ask you first about his father, Albert Brewer.

How long was it before Brent and Albert actually had a father-son relationship?

A. Not until he was 15.

[818] Q. Where were you living, ma'am?

A. I was living in Cedar Hill, Texas.

Q. Did – were you married to Albert at that time?

A. We lived together for a few months and decided we could work it out and be a family.

Q. You and Albert had been married earlier and divorced earlier, correct?

A. That's right.

Q. And after you divorced Albert the first time, you married another man?

A. I'm sorry. What?

Q. After you divorced Albert the first time, you married somebody else, correct?

A. Yes, I did.

Q. That was Don Bartlett?

A. Right, when Brent was two.

Q. Okay. Albert and you had some problems; is that correct?

A. Yes.

Q. Did Brent see you and Albert display these problems?

A. I'm afraid he did.

Q. And what were the problems that I'm talking about?

A. There were many. One was his jealousy of my [819] children. We had a good relationship. We talked and laughed and he seemed to feel he was excluded from that. And he would, like, punish me by being mean to my children.

Q. What would he do to your children?

A. He would talk with them one moment like he was a father. He would get mad, and wouldn't say anything, and we couldn't find out what was wrong.

And we – like, he would go out to work, and he would be happy. He'd come home mad, and we all just had to walk on pins and needles to keep from setting him off.

Q. What would he do when he got set off?

A. He would yell, he would throw things, he beat on me frequently.

Q. Did you ever see him beat on Brent?

A. He attacked my daughter verbally, but he never hit her. Yes, he has hit Brent numerous times.

Q. Did he ever hit him with objects?

A. Yes.

Q. What objects?

A. Once was the butt of a pistol. He was out in the back yard target practicing with a pistol, and he hit Brent in the head with the butt of the pistol. He has hit him with his fist, he has it him with a flashlight. He tried to hit him with a stick of firewood. When he went [820] outside to grab the firewood, I slammed the front door and locked it, and he smashed the glass out of the front door with the firewood. That was the night I had him arrested.

Q. Before you and Albert got back together, you had – Brent had a stepfather named Don; is that correct?

A. Right.

Q. How did Don treat Brent?

A. Right after we married, he treated him really well, and I thought he was going to be a good father. And then after he and I had a child, the older this child got, he ignored Brent, just like he wasn't there.

And he would take, like, our daughter, when she got to be two and three, four years old, he would take her to, like, a convenience store, buy her cokes and candy and tell her

to eat it up before she got back, and not bring him anything. And as he got older, he would see this.

Q. How did that affect him?

A. Well, it hurt his feelings. He came to me and he said, "Why didn't he bring me something?" I said, "I don't know. Let's go get you something, too." And I'd take him. And as my daughter got older, she saw what was happening, and when he would take her to the store, she always picked up Coke, candy, gum, whatever; she said, "I'm getting this for my Bubba."

Q. What is your daughter's name?

[821] A. Billie Ann Bartlett.

Q. Karon, how did Brent do in school?

A. He did real well until he got in the fifth grade, and he had to have back surgery. And I think that hurt him some. You know, that's a tender age to be different from anyone else.

But he was good in sports, he was on the championship football team, he played baseball, the championship on basketball, he was a starter player, very outgoing, very friends, and had lots of friends.

And I know he started – this was in junior high, and this is where some pot started coming in. And he started smoking pot.

Q. Did you catch him at it?

A. I caught him at it once when I picked him up at the skating rink, and I couldn't tell what it was for sure. And then when I realized what it was, he said he got it

from a boy there, that he said it was all over the skating rink. All the kids have it.

Q. Karon, do you know Amy Forrester or Amy LeMaster?

A. Yes, I do.

Q. How do you know her?

A. She was in our home numerous times. From my children going to school with her is how I met her.

[822] Q. And this is in what county?

A. Hamilton, Mississippi.

Q. And how big is Hamilton?

A. Oh, six, seven hundred people. Very small. It's scattered, it's rural.

Q. Were Brent and Amy boyfriend and girlfriend?

A. Yes.

Q. Did Brent and Amy break up while you lived there?

A. Yes, they did.

Q. Did you know Brent got punished for pushing her?

A. This was after they, had broken up. She had even been to our home on two occasions. One she brought her new boyfriend, who is now her husband, and tried to induce Brent to fight with this boy and Brent – I could hear them in the next room. I was watching TV.

And she was screaming and yelling at Brent. Curtis and Brent probably knew each other, didn't want to fight. And I don't know what she was all about that night, but she wanted these two boys to get in a fight over her.

I had had enough. I went and asked them to leave.

Q. Did you ever know that Amy had her arm paralyzed because of Brent?

[823] A. That is a bald-faced lie. That is a lie. Her arm was not paralyzed.

Q. It wasn't paralyzed for two months?

A. No, it was not, because she was working. How did she work? She's a waitress at a steakhouse.

Q. This was back in when they were in school together.

A. Right.

Q. She was working then, too?

A. She was working and going to school. I know Pam, the girl that Brent was talking to. I don't know if I can tell you what she told me about this incident.

Q. Let me – go ahead.

A. Pam came to our home and told us after she said that Amy was saying all of this. Pam worked with her at work. Pam got Amy this job, and they were friends at one time.

And she said the day this happened, she said, Brent had told her to go on. We were standing there talking at a locker, and she came up yelling at Brent, mad at him, and

we were just standing there talking, and Brent told her to go on, go on.

And then about the third time he told her to go only, she stepped between them and started screaming in his face, and he just shoved her with one hand, was all. [824] She said, "I believe she tripped over her own feet going backwards."

Q. Do you work now, ma'am?

A. Yes, I do.

Q. What do you do?

A. I'm a truck driver.

Q. Do you drive with Albert?

A. No. We have separate trucks.

Q. Okay. What were you doing when Brent was in school, what was your job?

A. In where, what city?

A. Cedar Hill?

A. I was assistant manager at Mervyn's department store.

Q. Did Brent help take care of his sister?

A. Oh, yes. From the time I went to work. She was 9 years old, and he was 13 when I went to work, and they would ride the bus home together. And he would always make sure she got in the house and got her after-school snack. They would call me at work. I knew when they got home.

Q. Did you have an occasion to see Brent and Kristie Nystrom together?

A. Yes, I did.

Q. On how many occasions?

[825] A. At least three.

Q. Where did you first see Brent and Kristie together?

A. This would be at Guy Blackwell's house in Amarillo.

Q. And this was after their release from Big Spring?

A. Yes. I did not want her to come down here. I did not know she was coming. And Guy had invited Brent to be his roommate, because I was gone three weeks at a time. And I said if that's satisfactory with Brent, okay.

Q. Had you visited with Brent while he was at the rehab?

A. In Big Spring?

Q. Yes.

A. I had spoken with him by phone. But the one day when I could get through, I was driving and it was a few minutes after visiting and they wouldn't let me visit. But I did talk to him numerous times by phone. I called him long distance with a calling card while I was out on the road.

Q. What was his – what were his plans upon release from Big Spring? Did he relate those to you?

A. Yeah, he did. When I found out that he had committed himself, and my mom told me that he wanted to [826] turn his life around, I called Brent, and I spoke with him. We spoke numerous times.

He was ready. He said, "I have to turn my life around. I have to get rid of these drugs, marijuana, crack, everything."

His plans were to go – to return to Abilene – when he turned himself in, he planned to return to Abilene to a halfway house. He had planned to counsel with other kids, to try to help other kids to get off of drugs, and this, in turn, with the counseling, would help him to stay away from the drugs.

It would mean a whole new set of friends. He understood that. I said, you cannot associate with your former friends. I know they are your best friends, you think, but they are not.

He even understood this. This was his plan,

Q. Did he do that when he got out?

A. No, he didn't. He started changing his tone as I spoke to him every few days. He had met someone, and wanted me to speak to her on the phone. I did. Kristie. He introduced me to her by phone, and I spoke with her on the phone.

Well, he started saying, "Well, I believe I want to go to a halfway house, maybe in Odessa or Midland." I said, "Why?" He said, "Well, I just think it [827] would just better just to get out of Abilene. That's what I was told."

Then he changed, and he wanted to come to Amarillo. I said, you know, I'm gone three weeks, in four days, gone three weeks. He said, this is fine, he could handle that. He'll go through a drug program here, like AA meetings, they have drug meetings. He'll go to those.

When he's ready, when he's strong enough, he'll go to work, he'll make new friends. This is a new start. I didn't know these other things.

Q. What changed, what happened?

A. Everything was Kristie. Everything was Kristie. And he was telling me she wants to come, too. I said, "Brent, I cannot support her. I cannot do this. I cannot support that kind of a lifestyle with you and this – and she's a woman 22 years old and you are a teenager. I can't support this."

Q. Do you think Kristie controlled Brent?

A. Yes. I didn't realize the extent until I arrived in Amarillo and met her.

Q. Ma'am, I thank you. That's all.

MR. BIRDSONG: Pass the witness.

CROSS-EXAMINATION

[828] *BY MR. SHERROD*:

Q. Just a few questions. Ma'am, first of all, when he got this great awakening that he was going to turn his life around, he had a job, I'm sure. Was he working?

A. He worked for Exxon.

Q. Okay. How long?

A. You've got to understand, I was on the truck, and he was at my mother's, and I can't give you an exact date or figure.

Q. Was that before he went to rehab?

A. Okay. I was going – okay, wait a minute. I was fixing to go to work in Amarillo, and I was living in Abilene, and my car, I had two flats on it, and I didn't have a spare and nothing was open. But I got to a pay phone, and my mother had to come pick me up in her car in Post, Texas.

Brent – this was his only way to work, was using my mother's car, but she had to come get me. I was stranded. He called and told them he was going to be late, but when he went in to work, he was fired.

Q. And that was before he went to the halfway house?

A. Yes.

Q. After he got out of the halfway house, did he [829] have a job?

A. After he came to Amarillo?

Q. Uh-huh.

A. Oh, no.

Q. Oh, no – I mean, did he ever work?

A. He tried to work. He didn't have a car, he didn't have transportation to do it.

Q. And he stayed in your apartment or your house while he was in Amarillo?

A. No, he stayed in Guy Blackwell's house.

Q. Okay. And then after he left Guy Blackwell's house, where did he go?

A. Guy Blackwell threw him out.

Q. Was he paying his rent?

A. I paid rent.

Q. So, you –

A. Brent in return helped Guy. I said I didn't think I was paying enough and Guy said, yes, you are, because Brent cleans my house. He has two children he sees every weekend.

He said, "Brent cleans my house from top to bottom, he does my laundry, he does painting on this house, he does yard work. Brent more than pays for staying here. And with what you give him for this his cigarettes and part of the utilities, that more makes for [830] anything. Brent helps me out. He keeps my house clean."

Q. You were buying cigarettes for him, too?

A. Well, sure, he's my son.

Q. He couldn't afford cigarettes?

A. He was not going to work as long as Kristie was there. Kristie would not work. She was too lazy.

Q. I thought she was a topless dancer at Cassidy's or Crystal Pistol or whatever.

A. Right. Because Guy had thrown them out. They had no other place to go.

Q. She was working –

A. Brent had a roofing job –

Q. She was working –

A. – and the boy was supposed to come pick him up, this friend that got him the job, and he never showed up to pick him up. He lost that job because he couldn't show up the first day. He had no transportation.

Q. Nothing this man has done in 21 years is his fault, is it, Mrs. Brewer?

A. Oh, we all have to assume responsibility for some of our actions.

Q. But the job, the fact that he couldn't work is because of a friend, or the fact that he couldn't get a job was because of Kristie. It's pretty nice just to lay around –

[831] A. He didn't have any transportation. I'd like to see you try to get a job with no friends in town and no transportation. You can't do it. I've been there.

Q. How did Kristie get this job that she had at the topless joint?

A. I have no idea.

Q. How did she get to work?

A. I have no idea. I know one thing. She begged rides from everybody.

Q. And, of course, when –

A. It was also not very far to work.

Q. And, of course, when this guy kicked Brent out of the house that he was living in free –

A. No, he didn't live there free. No, I didn't say that.

Q. How much –

A. I said Brent worked and cleaned this man's house, did his laundry, helped tend to his children. When he had to go to work – he was a mechanic at Builder's Transport – when he had to go to work on the weekend, Brent tended his two small children. Guy left them with Brent, in Brent's care. He fed them, bathed them, put them to bed, tended to them.

Q. Did you just tell us that he kicked him out?

A. Yes, he did. You've got to realize Guy [832] Blackwell is an alcoholic, too.

Q. Well, that's his fault again, then, correct?

A. No. I'm telling you – well, you don't want to listen to what I have to say.

Q. Well, let me ask you, did you have conversation with Amy Forrester today?

A. Yes, I did.

Q. What did you tell her?

A. I said, "You know what you said is a lie; you know it and I know it."

Q. That's all you said?

A. That's all I said to her. I said, "You have to live in Hamilton, and so do I."

Q. Did you go out there and tell her that you heard what she had said on the witness stand, and that she would pay for it?

A. I didn't tell her she would pay for it.

Q. Did you tell her –

A. I said, "I heard that you – what you testified, two months paralyzation (sic)," and that's not true at all. She wasn't off work that long.

Q. Can you answer the question I'm asking you, ma'am?

A. Make it straight.

Q. Did you tell the woman that you heard what she [833] said on the witness stand, and that she would pay for it?

A. No, I didn't say she would pay for it.

Q. Did you tell her –

A. I said, "I heard what you said, and you know it's a lie, and I know it's a lie."

Q. Did you tell her, ma'am, that, "You and I live in the same county, and you will pay"?

A. No, I didn't say "county." You've got that wrong.

Q. That wasn't what you said?

A. No, I did not say "county." I said, "You know you live in Hamilton and so do I. We have to live in the same town."

Q. What did you mean by that?

A. Well, she's going to have to face me, and she knows she's come up here and lied.

Q. What are you going to do to her when you face her?

A. What would I do to her?

Q. Did you slap her before? Have you ever slapped her?

A. When she started cussing me in my own home, and I asked her to leave repeatedly, and she would not leave, and she was cussing me –

Q. You slapped her.

[834] A. – in my own home?

Q. Did you slap her?

A. Yes, I certainly did. And I'll do it again if she comes to my house cussing me and won't leave when I ask her to.

Q. How old was she?

A. You don't know how many times I've had to run this girl off.

Q. How old was she?

A. I don't know how old she was.

Q. How come she kept coming back to the house?

A. She was sick.

Q. Or was it because –

A. She came to our house one morning at 2:00 o'clock in the morning drunk, banging on his window.

Q. Again, that's her fault and not his, correct?

A. She didn't – she was not invited. He did not invite her. We didn't have a phone at that time. She came to our house drunk at 2:00 o'clock in the morning.

Q. Have you got a pretty violent temper?

A. Do I have what?

Q. A pretty violent temper.

A. No, I don't.

Q. Pretty easy-going gal?

A. Most of the time. This has my nerves on edge. I [835] think everybody can understand that. I'm very upset, and I'm trying not to cry.

Q. And you didn't make any threats to Amy Forrester today at 3:45?

A. No, I did not.

Q. You didn't make any –

A. I said, "You lied, and I know you lied, and you know you it and I know it, and we have to live in the same town. We both live in Hamilton." And I did not say "county," you got that wrong.

Q. Thank you, ma'am. We'll see if we can correct that. Okay?

MR. SHERROD: That's all I have, Your Honor.

MR. BIRDSONG: That's it, Judge.

THE COURT: You may step down, Mrs. Brewer.

* * *

No. 6997-A

X IN THE 47TH DISTRICT COURT
X
X IN AND FOR
X
X RANDALL COUNTY, TEXAS

[Caption Omitted In Printing]

DEFENDANT'S SPECIAL REQUESTED CHARGE AT PUNISHMENT NO. 8

(Filed June 1, 1991)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, BRENT RAY BREWER, Defendant in the above styled and numbered cause by and through his attorneys of record and pursuant to Article 36.16, Texas Code of Criminal Procedure, requests this court prior to the submission of the the [sic] charge to the jury that the court submit the following Defendant's requested instruction:

SPECIAL ISSUE NO. 4

You are instructed that the term "mitigating evidence" is evidence about any aspect of the Defendant's background, his character, and the crime of which he was convicted that you believe, in fairness or mercy, calls for a sentence less than death. The purpose of this fourth special issue is to provide you the jury, if you deem it necessary, with a means of considering and giving effect to the mitigating evidence, if any, presented in this case. The sole question before you now is whether, considering all the evidence, mitigating, if any, and otherwise, presented in both phases of this trial by either party, the death

penalty is a reasoned moral response to the Defendant's background, his character, and to the crime of which he was convicted.

Now bearing in mind these instructions and definitions, you will answer the following special issue:

Do you find from the evidence, after considering fully the Defendant's mitigating evidence, if any, that the death penalty is a reasoned moral response to the Defendant's background, his character, and to the crime of which he was convicted?

Answer

We, the Jury, unanimously find and determine that the answer to this Special Issue is "Yes."

_____

FOREMAN OF THE JURY

OR

We, the Jury, or at least ten (10) jurors, find and determine that the answer to this Special Issue is "No."

_____

FOREMAN OF THE JURY

In the event that the Court declines to charge the jury in any legally sufficient manner on the issues set out in the foregoing Defendant's Requested Special Charge, the Defendant would hereby object to the Court's failure to charge the jury properly.

Respectfully submitted,

/s/ C.R. Daffern
C.R. DAFFERN
1800 S. WASHINGTON,
SUITE 313
AMARILLO, TEXAS 79102
(806) 372-8215
STATE BAR #05308500

~~/s/~~ Kent Birdsong
KENT BIRDSONG
621 S. FILLMORE
AMARILLO, TEXASS [sic] 79101
(806) 371-9333
STATE BAR #02333630

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been hand delivered to the Randall County District Attorney's office, Randall County Courthouse, Canyon, Texas, 79015, on this the 1 day of June, 1991.

/s/ C.R. Daffern
C.R. DAFFERN

ORDER

~~GRANTED~~/DENIED on this the 1st of June, 1991. JUDGE PRESIDING

/s/ David L. Gleason
JUDGE PRESIDING

No. 6997-A

X IN THE 47TH DISTRICT COURT
X
X IN AND FOR
X
X RANDALL COUNTY, TEXAS

[Caption Omitted In Printing]

DEFENDANT'S SPECIAL REQUESTED CHARGE AT PUNISHMENT NO. 11

(Filed June 1, 1991)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, BRENT RAY BREWER, Defendant in the above styled and numbered cause by and through his attorneys of record and pursuant to Article 36.16, Texas Code of Criminal Procedure, requests this court prior to the submission of the the [sic] charge to the jury that the court submit the following Defendant's requested instruction:

> 1. When you deliberate about the questions posed in the Special Issues, you must consider any mitigating circumstances supported by the evidence presented in both phases of the trial. A mitigating circumstance is any aspect of the defendant's character and record or the circumstances of the crime which, in fairness or mercy, calls for a sentence less than death. If you find that there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the Special Issues. The law does not identify or limit the aspects of the defendant's character and record or the circumstances of the crime that are mitigating. The law does not impose a formula for

determining how much weight a mitigating circumstance deserves. You are the sole judge of whether mitigating circumstances exist and if so, how much weight they deserve.

2. You may deliberate as a body about mitigating circumstances, but you are not required to reach an unanimous verdict as to their existence or weight. When you vote about the Special issues, each of you must decide for himself whether mitigating circumstances exist and, if so, how much weight they deserve.

3. You must consider and give mitigating effect to all of the mitigating circumstances, including those that have no relationship to any of the Special Issues. You must independently weigh each mitigating circumstance without reference to its relationship to the Special Issues.

4. There are two ways for you to give mitigating effect to the mitigating circumstances you have found. You may use a mitigating circumstance to answer a Special Issue "no" or you may use a mitigating circumstance as a basis for leniency even if you are persuaded that all of the Special Issues must be answered "yes." If you decide that all of the Special Issues must be answered "yes" and you also have found mitigating circumstances which call for a life sentence, you must not answer the Special Issues. Instead, to give effect to the mitigating circumstances, you must write the word "life" in each of the spaces on the verdict sheet where you would otherwise answer the Special Issues "yes" or "no." A verdict of "life" has the same effect as a verdict that answers at least one Special Issue "no."

5. If you decide that an aspect of the defendant's character and record or the circumstances of the crime is a mitigating circumstance, you must not give it aggravating effect. Thus, if in your judgment, a mitigating circumstance independently calls for a life sentence even though it also tends to support a "yes" answer to a Special Issue, you must not answer the Special Issue "yes," but rather you either answer it no or you may use it as a basis for a vote for mercy and write the word "life" in your verdict form.

In the event that the Court declines to charge the jury in any legally sufficient manner on the issues set out in the foregoing Defendant's Requested Special Charge, the Defendant would hereby object to the Court's failure to charge the jury properly.

Respectfully submitted,

/s/ C.R. Daffern
C.R. DAFFERN
1800 S. WASHINGTON,
SUITE 313
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(806) 372-8215
STATE BAR #05308500

/s/ Kent Birdsong
KENT BIRDSONG
621 S. FILLMORE
AMARILLO, TEXASS [sic] 79101
(806) 371-9333
STATE BAR #02333630

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been hand delivered to the Randall County District Attorney's office, Randall County Courthouse, Canyon, Texas 79015, on this the 1 day of June, 1991.

/s/ C.R. Daffern
C.R. DAFFERN

ORDER

~~GRANTED~~/DENIED on this the 1st of June, 1991.

/s/ David L. Gleason
JUDGE PRESIDING

NO. 6997-A

§ IN THE 47TH DISTRICT COURT
§
§ IN AND FOR
§
§ RANDALL COUNTY, TEXAS

[Caption Omitted In Printing]

CHARGE OF THE COURT

MEMBERS OF THE JURY:

The defendant, BRENT RAY BREWER, has been found guilty by you of the offense of capital murder. You are instructed that a sentence of life [imprisonment /s/ DG 6-1-91] or death is mandatory on conviction for capital murder. In order for the court to assess the proper punishment, questions called special issues are submitted to you. Before answering these issues, you are instructed as follows:

I.

The burden of proof on this phase of the trial is still on the State; and the State has the burden to prove beyond a reasonable doubt that the answer to each issue submitted to the jury should be "Yes". The jury may not answer any issue "Yes" unless the jury agrees unanimously on such answer.

II.

The jury may not answer any issue "No" unless ten or more jurors agree. If any juror has a reasonable doubt as to the answer of any issue, the juror shall vote "No" as to that issue.

III.

If there is any issue on which the vote of the jurors is not unanimously "Yes" or not at least 10 in favor of an answer of "No," then there shall be no answer for that issue and the foreman will not sign his name to any answer form for that issue. The jury may not discuss or consider the effect of failure of the jury to agree on the answer to an issue.

IV.

In answering the issues hereinafter submitted, you may consider all of the evidence admitted during the first phase of the trial, before your verdict of guilty, as well as all of the evidence admitted during the punishment phase of the trial.

V.

You are instructed that certain evidence was admitted before you in regard to the defendant's having committed offenses other than that for which he is now on trial. You are instructed that such evidence cannot be considered against the defendant in your deliberations unless you first believe that such offenses were committed by the defendant beyond a reasonable doubt.

VI.

You are instructed that, as used in the first special issue, the word "deliberately" has a meaning different and distinct from the word "intentionally," as that word was previously defined in the charge at the guilt/innocence phase of the trial. You will recall that the word "intentionally" as

defined in the charge at the guilt/innocence phase of the trial was defined as follows: a person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. The word "deliberately", as used in the first special issue, means a manner of doing an act characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences; willful, slow, unhurried, and steady as though allowing time for a decision.

You have already found that the defendant acted intentionally in committing capital murder. The first special issue requires you to determine whether defendant's conduct in causing the death of the deceased was also committed deliberately, as that term has now been defined for you. If you believe that the defendant acted intentionally, but you have a reasonable doubt whether his conduct was also deliberate, you will answer the first special issue "no."

VII.

Under the law applicable to this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-fourth of the sentence imposed or 15 years, whichever is less, without consideration of any good conduct time he may earn. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

VIII.

Our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded a defendant, and in the event he elects not to testify, that fact cannot be taken as a circumstance against him.

In this case, the defendant has elected not to testify, and you are instructed that you cannot and must not consider, discuss, allude to, comment upon or refer to that fact throughout your deliberations or take it into

consideration for any purpose whatsoever as a circumstance against him.

IX.

In arriving at the answers to the issues submitted, it will not be proper for you to fix the same by lot chance or any other method than by a full, fair and free exchange of the opinion of each individual juror.

X.

During your deliberations in this case, you must not consider, discuss, or relate any matters not in evidence before you. You should not consider or mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

XI.

After you have retired to the jury room, no one has any authority to communicate with you except the officer who has you in charge. You may communicate with the Court in writing through the officer who has you in charge. Do not attempt to talk to the officer who has you in charge, or the attorneys, or the Court, or anyone else concerning any question that you may have.

XII.

After the reading of this charge, you shall not be permitted to separate from each other. After argument of counsel, you will retire and consider your answers to the

issues submitted to you. It is the duty of your foreman to preside in the jury room and vote with you on the answers to the issues submitted.

/s/ David L. Gleason
JUDGE PRESIDING

FILED IN OPEN COURT

/s/ David L. Gleason
Judge Presiding
Date: 6-1-91 2:28 pm.

NO. 6997-A

X IN THE 47TH DISTRICT COURT
X
X IN AND FOR
X
X RANDALL COUNTY, TEXAS

[Caption Omitted In Printing]

* * *

[868] STATE'S CLOSING ARGUMENT

MR. FRISTOE: Thank you, Your Honor. May it please the Court, Counsel. Ladies and gentlemen of the jury, the Judge has just read to you the special issues that are to be submitted to you with his Charge.

The Charge also contains a paragraph that says that you as a jury can consider all of the evidence in this case, everything at the guilt-innocence stage, everything at the punishment stage in arriving at your verdict. The Court goes on down to define deliberately for you.

And as you know from the selection process [869] in this case, counsel for both sides spent a lot of time on these two particular words with each of you.

The Court has defined deliberately for you. He has also chosen to define intentionally as you used it at the guilt-innocence phase of this trial.

What I want to go over with you is some of the evidence in this case that you can take back and apply to Special Issue No. 1, and that is the deliberateness of the Defendant's conduct in causing the death of Robert Laminack. And also for Special Issue No. 2, which deals with the probability that the Defendant will commit criminal

acts of violence that would constitute a continuing threat to society.

You remember that we talked with you about deliberately being an act characterized by or resulting from careful and thorough consideration, characterized by awareness of the consequences, willful, slow, unhurried, steady as though allowing time for decision.

Let's look at the evidence in this case and see how the conduct of the Defendant in this case is, without doubt, deliberate.

If you remember from the evidence, it was testified to that the Defendant was evicted from this apartment with the two ladies, left the [870] apartment after packing his belongings.

MR. BIRDSONG: Excuse me. I need to make an objection at the Bench, Judge.

THE COURT: Very well.

(Thereupon, the following

(proceedings were had at the

(Bench:

MR. BIRDSONG: Your Honor, at this time, the Defendant proffers its objection in stating that – the evidence during the guilt-innocence phase was not retendered for the punishment phase of the trial.

We object to any references made by the State regarding the guilt-innocence evidence, as construed by no means alluded to or referred to or remarks about any evidence not before; specifically, that was presented in the guilt-innocence phase of the trial, and we cite the Court the

Fifth Amendment, Sixth Amendment and Fourteenth Amendment, United States Constitution; Article 1, Section 10, 13, and 19 of the Texas Constitution; Article 105 of the Code of Criminal Procedure; Article 37.07 and 37.071 of the Criminal Procedure.

THE COURT: Your objection is overruled. [871] In the event you wish to restate this objection later during argument –

MR. BIRDSONG: I think you covered it. I don't want to interrupt his argument in any sense of the word.

THE COURT: If you wish to interpose the same objection, please refer to it as Defendant's Punishment Argument Objection No. 1.

MR. BIRDSONG: Is it the court's position that only – every time he comments on the guilt-innocence evidence, I will have to do that?

THE COURT: If you wish to.

MR. FRISTOE: Your Honor, I'm going to object to the Court allowing him to do that, because I am going to be doing that the entire time of my argument. And – I mean, he could object at each –

THE COURT: Just one objection will cover it.

MR. BIRDSONG: That is why I went ahead and wrote it out the way I did.

THE COURT: The objection is overruled.

(Thereupon, the following

(proceedings were had before

[872] (the Court and jury, to-wit:

MR. FRISTOE: As I said, ladies and gentlemen – as I stated previously, this deliberate conduct can be seen by the fact that the Defendant packed his bags, told his companions in the apartment, "I'm going to leave. I'm going to go find a ride to the Salvation Army."

Left his belongings there, though. All he carried with him was a butterfly knife. A butterfly knife that you heard Dr. Coons describe up here, and as you can see for yourself when you look at it, it is meant for nothing – nothing other than to maim or kill. That's all that type of weapon is for.

So, he leaves to get a ride to the Salvation Army with a butterfly knife. He walks ~~from the~~ Raintree Apartments to Mr. Wonderful's parking lot. There Ivy Craig is confronted.

Ivy Craig is a lucky lady. Ivy Craig would be a dead lady if she had given them that ride.

MR. BIRDSONG: Judge, that's conjecture. We object.

THE COURT: Overruled.

MR. FRISTOE: Then it got too hot in the parking lot at Mr. Wonderful's, because too many people around, so they go around, and they see Mr. [873] Laminack working in his shop, asked Mr. Laminack to help this sick girl by taking her to the Salvation Army.

Now, folks, this is the Mr. Laminack that this family started with that night. That's him.

So he goes, talked to his daughter, said, "I'm going to help these folks." They are standing outside and we know

what they are thinking. We know what he's thinking, excuse me.

MR. DAFFERN: Okay. I'm going to object to reference to "they," Your Honor." The only conduct that is –

MR. FRISTOE: I just withdrew that, Mr. Daffern. He thought it was –

MR. DAFFERN: Well, I would like for the Court to rule on my objection, please, Counsel.

THE COURT: Objection is sustained.

MR. DAFFERN: I would ask the jury be instructed to disregard "they," Your Honor.

THE COURT: The jury is so instructed.

MR. DAFFERN: Further, because of the prejudicial nature of that, I would move for a mistrial.

THE COURT: Denied.

MR. DAFFERN: Thank you.

[874] MR. FRISTOE: He thought it. Mr. Laminack's daughter couldn't convince him not to do that. He comes back, gets in the pickup, and as we pointed out earlier in the guilt-innocence phase, drove hardly a block.

Then from the evidence, you can build a scenario as to how this man was attacked. The wound to his right shoulder.

I submit to you that that wound was inflicted while Mr. Laminack was driving his pickup and lifts that arm to protect himself.

Then we have the steering wheel grabbed, his foot kicked off of the accelerator, and his right arm grabbed. Then, as Dr. Erdmann showed you, that natural instinct to protect your neck, he puts his face down and he gets this one.

Then the deliberateness. The deliberateness. Here it comes. The consequences that this Defendant knew would result. The consequences. Because we've got him grabbing for the knife. We've got him trying to defend himself, and he gets this. He gets this.

Then, we stretch him back. He stretched him back. He's in the back seat. He stretches him over that seat and then cuts his throat.

[875] When that happens – when that happens, Mr. Laminack's life spatters on the window. And he's there, and as we can see, and as we know, he watches himself bleed to death. He watches himself bleed to death.

Then, we apply this evidence in the brutality of what is before you there, to whether or not this Defendant will commit criminal acts of violence that are a continuing threat to society.

Can there be any doubt? Can there be any doubt at all, when he's willing to do that? When he's willing to leave an apartment and do that to this man that was nothing but a good citizen, a kind man willing to help.

The Laminack family started with that and ended with this. And that should be a consideration in your verdict.

MR. DAFFERN: I'm going to object to that, Judge, as a request for community wants.

THE COURT: Overruled.

MR. FRISTOE: There is your deliberateness. There is your deliberateness. There is your continuing threat and the manner in which he inflicted it.

Mr. Laminack had him a new Ford pickup, [876] 2200 miles on it, and he had that cup in the seat with him that night. That's his blood on that cup. That's his blood.

Well, life doesn't begin at retirement for Mr. Laminack. That's when it ends.

But have you seen – you've sat in this courtroom, you've sat here like all of us have for four days, and have you seen one ounce of remorse out of this person, one ounce of remorse?

MR. BIRDSONG: Your Honor, that's a comment on –

MR. FRISTOE: Your Honor, the jurors are allowed to observe the Defendant.

MR. BIRDSONG: Let me object at the Bench.

THE COURT: All right, sir.

(Thereupon, the following
(proceedings were had at the
(Bench in the presence of, but
(presumably out of the hearing
(of the jury:

MR. BIRDSONG: We object to Mr. Fristoe's remark regarding Mr. Brewer, which is my client, as a comment on his failure to testify.

THE COURT: Overruled.

(Thereupon, the following

[877] (proceedings were had before

(the Court and jury, to-wit:

MR. FRISTOE: You haven't seen it. You didn't see him cry for Mr. Laminack. You've seen them cry for Mr. Laminack. You haven't seen him –

MR. BIRDSONG: That is not in evidence. I object.

THE COURT: Overruled.

MR. FRISTOE: This photograph that was introduced, there is his attitude toward what he's accused of. There is his attitude.

You can look at that and say, well, I wonder who's fault that is, because it wasn't his.

There is your deliberateness that started here, ends here. And then here's what society could look forward to from this Defendant.

Both special issues should be answered "yes." The evidence supports that. There can be no doubt that it supports it. Thank you very much.

THE COURT: Defendant may present argument.

DEFENDANT'S CLOSING ARGUMENT

MR. BIRDSONG: Thank you, Judge; Counsel. Ladies and gentlemen, I'm going to visit with you for a

while. I'm not going to holler at you again, but I [878] am going to use some visual aids, also.

I do want to thank you for your time. What we are talking about today is what is fixing to happen. And you have a harder job now than you did at guilt-innocence.

And I can sit here, and I can talk to you about Mr. Laminack, and you've made a decision regarding Mr. Laminack and found Brent guilty of capital murder.

But now you have to decide what happens to Brent. And the bottom line is this: Is it life in prison, or is it death?

And we talked about certain factors and certain things that need to be considered. There's nothing that any of you all can do today that is going to bring Mr. Laminack back to these folks.

You're going to have to make some decisions, and some hard decisions. And I want to help you think about certain things that happened during the trial that will help you make those decisions and answer those special issues.

Now, we talked about deterrence as a function of punishment, rehabilitation as a function of punishment, and retribution during voir dire. And that's what you all need to be thinking about.

[879] And I submit to you there's a reason that the Prosecutor wanted to show more gruesome pictures to you and keep that in your mind. You know, the bottom line is we have to look forward and determine whether the State has carried their burden for the "yes" answers or for the

"no" answers. And that's your job. That's what you're fixing to do.

When you look at what they showed you for the deliberateness, for the extra regarding – you've already found intentional, but now you've got to determine deliberate.

The people they brought in to you during the second phase of the trial, not many of them said much about deliberateness. And when they were talking about deliberateness or how they could get to it or add it on, I submit to you the other side of that coin is a robbery went awry.

Mr. Fristoe told you that Ivy Craig was lucky because she didn't get killed. Well, folks, there is a different side of that coin; there's two sides to this side. A robbery went awry.

You saw in the video that – the knife in the truck. You also saw from the video there was another person present, you know. And we have listened to the witnesses from the State testify [880] about Kristie Nystrom. We have listened to the witnesses put on by the Defense testify about Kristie Nystrom.

And I submit to you, if you consider it all, they haven't carried the burden to get past the deliberate on Special Issue No. 1. When it comes to Special Issue No. 2, you have got to determine whether Brent will be a continuing threat to society through criminal acts of violence.

What did the State give you to come up with a "yes" answer for that?

They had to reach all the way back to when he was boy and bring in teachers from when he was a child. And I

submit to you that the reason they did that was because there was no acts adjudicated as an adult.

The State would have brought in here pen packs if he had had a felony conviction. They would have marched Sheriff's deputies in here to tell you he was a bad prisoner while he was here. You didn't see any of that.

What you saw was people coming up here from all over the nation, talking about a kid, talking about a boy. And when they talked about it, they couldn't remember very much.

[881] But we got into evidence the facts about the Cedar Hill. And when you read this, you're going to see Brent's version, and you're going to read Brent's version about what happened at the school. And I submit to you that doesn't help you get to a "yes" on Special Issue No. 2.

He explains how he got put in in-school suspension or AEP. And that's a kid talking. Why would the State want to get little-boy stuff in? Because they don't have the real stuff.

They go a little bit further, though, and they get his girlfriend from Mississippi, Amy Forrester.

And it's interesting that I was the one that had to bring out that Amy and Brent dated for a year. Amy and Brent were physically intimate for a major amount of that time.

And I don't know what to think, other than when that kind of stuff is going on with children – kids that young, feelings are strong. They try to make it sound like Brent pushed her into a locker to break her back, cause her to be paralyzed.

The paralysis is at issue. The bottom line is, there was an argument, she got in his face, he pushed her back and all of a sudden, she's hurt.

[882] Folks, that's not something that going to help you get to "yes" on Special Issue No. 2 when you look at it for what it is.

Then they go to Florida. They talk about Brent being involved with some older folks. He is driving for them. And Officer Mosher couldn't wait to tell us about how bad that neighborhood was. I think he told us four times. And there's a reason for that.

They wanted to make you think about that, but not the fact that Brent was involved with older people that had an influence on him. And one of them was a woman, one of them was an older man.

When you look at that in its proper context, it's not helping you to get to "yes" on Special Issue No. 2.

Mosher wanted to talk about how close that knife was to him. He didn't talk about putting it in Brent's hand in any sense of the word.

What he did talk about was John Greenman had made threats to the police and they wanted to pull over Greenman's car to see if Greenman was in there. Folks, put it in its proper context.

Those things that are out there, there's not a one of you on the jury, there's not a one of us [883] in this courtroom that can't think when we were 16, 17, 18, 19, and we did something that we got in trouble for.

Every one of us will be able to say that at that time, we were with somebody else. Whenever we got in the most trouble, somebody else was there.

Each of these times, Brent has been influenced by a girl, has been influenced by older folks, has been influenced by the co-defendant in this case, Kristie Nystrom.

And this is the picture Mr. Fristoe didn't want to put on here. And I'm certain when I sit down and C.R. sits down, they will be able to pull off the tag, the paper that I put on, but this is the blood of Mr. Laminack and the blood of Kristie Nystrom on a fingerprint. And it's there for you all to consider just as well. And here she is. It's there, also.

Your choice on Special Issue No. 2 is to determine whether – which of these is going to have the major influence on your verdict. Retribution, eye for an eye, is that what we've seen, is that what the State has proven up? I don't think so.

And we talk about Albert, and we talk about his father. Folks, dysfunctional families are not an [884] excuse, and we're not here to tell you about an excuse. What I'm here to tell you is that they are factors for you to consider when you are dealing with these issues.

Life in prison will make sure that Brent will not be around woman that can influence him; will not be around fathers that can hurt him and beat him and influence him. Life in prison will get him away.

You know, the hypothetical that the Prosecutor talked with Dr. Coons about was based on lots of things. And I don't know how many times he used the term "assume." I lost count after ten.

We've all heard the little saying about "assume." But what I want you to realize is the facts that he talked about, that he assumed his answers on were facts that he didn't have – he didn't have the chance to see how those witnesses testified, like you did.

He didn't get the chance to see their demeanor. He didn't get a chance to see whether Skee was telling the truth or not. Those are the things that you've got to see. And Dr. Price came in and told you that doctors do not have anything special that you all don't have to help answer those issues.

I submit to you the hypothetical that Dr. [885] Coons answered regarding Special Issue No. 2, it's a house made of cards, it's a sand castle. It can be washed away when you realize that you've got more information in front of you than Dr. Coons ever had.

I'm fixing to sit down now, but I want you to realize that this is what we're here for. You're determining what to do about Brent in answering those special issues.

Again, there is nothing that you all can do to bring Mr. Laminack back, but you've got to determine whether you are there to say retribution, eye for an eye; you've got to determine whether you're going to say deterrence and rehabilitation.

Folks, I submit to you the special answers on both issues should be answered "no." Put Brent in the penitentiary forever. Thank you.

THE COURT: Defense may continue argument.

MR. DAFFERN: Thank you. May it please the court, Mr. Sherrod. Ladies and gentlemen, what you have

to do at this phase of the trial, I feel, will be harder than what you had to do at the first portion of the trial. You have to make a decision whether Brent Brewer will get the death sentence or a sentence of life in the penitentiary.

We didn't really put any evidence on at the [886] first stage of the trial. We had no evidence to put on.

We tried to bring forward what we could that we thought would help you in any decision you had to make at this stage of the trial.

What did you hear? Well, you have two issues, is what you have, and the Court has given you the Charge. And probably all of you, or most of you recall from voir dire, we talked to you extensively about the word "deliberately."

Now, we asked, you know, if you have found that a person has intentionally committed capital murder, would you just automatically answer that question "yes" when you get to this stage.

Well, this is why we asked you that question. Because deliberately – if you recall, we went over it back and forth, and the Judge instructs you on deliberately. And he says – and listen, you will get the Charge.

I ask that when you go back, you read all of the Charge. It is important. It may seem like semantics, but it is important that you follow the law the Court has given to you.

Resulting from careful and thorough consideration characterized by the awareness of the [887] consequences, willful, slow, unhurried, and as though allowing time for a decision.

Is that what the facts of this case show? Is that what the facts of this case show? Unhurried, willful, slow. That's somewhat different from intentional.

We talked with some of you about deliberate in that regard, willful, slow, unhurried. The knife, if you recall, was found at the scene. The vehicle was left there, just left on the road.

Does that show willful planning? Does that show unhurried consideration? Is this a crime – and listen, the crime is just gruesome. But I would submit to you any capital murder case is gruesome.

You don't get to a capital murder case without having terrible, terrible facts. And that occurs in any capital murder case.

But what shows deliberate conduct here? Is it – and I'm sure Mr. Sherrod will get up and tell you, well, it could have been formed in a moment, just like I break that pencil.

Well, willful, slow, unhurried. Look at the facts on the thing. The knife was fund [sic] there. We give our real name when we go to the hospital. Listen, is that planned?

[888] And Mr. Sherrod will say, well, he's just – you know, he didn't plan very well. You know, he's just – he is deliberate and dumb. I'm sure that's what he's going to say, you know. Didn't think.

That is not deliberate, people. It's not deliberate.

Now, you received school records. You received for your consideration, for whatever it might mean to you, an

involuntary commitment, because of mental illness and presenting a substantial risk of harm to himself or others.

Now, is that the type of conduct that can plan, deliberate? And you can say, well, I wouldn't – you know, that conduct is so bad, you know, on the thing. You can read that many different ways.

But that's Brent. That's Brent. You know, we couldn't make that up. You know, it's fact.

Now, I want to talk to you just a moment about Dr. Coons. Now, Dr. Coons came in here to get you to – answered one question.

He came in here, and Mr. Sherrod will get up and tell you what [sic] he came here, and he told you that there is a probability – and he did say that – that based on all this hypothetical assumption, that [889] Brent Brewer, this man, would commit criminal acts of violence that would be a continuing threat to society. That's the reason he came here.

Never examined him. And listen, what kind of testimony – what is that worth? This, I would submit to you, is a hired doctor. You know, he is just a hired gun to come in here and say, hey, you ought to kill this man. You know, I travel the country testifying. And he never examined him.

We brought Dr. Price in, not to examine – testify, but to counter Dr. Coons, if he did. I don't know. You may not have believed what Dr. Price said.

Does it not make sense to you if you don't examine someone – I don't know. Maybe you feel like someone says, "I'm a psychiatrist," you're just going to believe anything that person says.

Well, if you recall, you can either take that opinion or cast it away. Would you take an opinion like that about someone you know from a psychiatrist who had not examined the person? Would you do that?

If you wouldn't, then why would you kill a person, answer the question "yes," based upon a psychiatrist who has never examined the person?

[890] You ought to be able to see, as well as a psychiatrist could, from the facts, and that's the – and you saw facts that you may take or discard. What he had was a hypothetical assumption.

I submit to you, it could be a situation where a doctor could say hypothetically, I could fly, you know. Hypothetically, a doctor can do anything.

Do not – please do not act upon that type of testimony. I ask that you answer the two special issues no.

And let's go to the second special issue just a moment. Let's talk about a probability. What does a probability mean?

A probability. We talked about that some on voir dire. A likelihood, a probability that Brent in the future would commit criminal acts of violence.

Now, criminal acts of violence. What criminal acts do you have before you here?

Well, one criminal act that you have is carrying a concealed weapon. Now, is that a criminal act of violence? I submit it is not. Carrying a concealed weapon.

Also, failure to get a Florida driver's license. Boy, that is a criminal act of violence right there. You've got to have that.

[891] Now, you have an act of violence towards his father. That was not filed on. That was not a criminal act. You heard his father testify that, in the father's opinion, that was justified. A terrible home life. Terrible home life.

And you saw his dad when he testified. You know, that man came up here and told you that he had done wrong, and his conduct has caused this.

His mother testified as to what kind of home situation. Is that evidence that would not help you to answer criminal acts of violence in Special Issue 2? No. Continuing threat to society.

Let's talk about one thing a moment. You have found Brent guilty of capital murder. The Court in the Charge tells you that if the questions are answered "no," that he will be sentenced to a term of imprisonment. He will not be eligible for parole until the actual time served equals one-fourth of the sentence imposed or 15 years, whichever is less, without any consideration of any good conduct time he may earn.

Well – and also, it further says eligibility for parole doesn't guarantee that any parole will be granted.

Now, you can say, well, I guess Mr. Sherrod [892] will get up and say, you know, you shouldn't even think about that. He ought to forfeit his life. He should forfeit his life.

Mr. Birdsong talked to you about retribution. I don't know. This is a hard job. This is a job that you're –

Anyway, as I said, I'm sure we all wish none of us were here, and everyone probably wishes that this had never occurred. But it has. It has.

He's going to be punished, whatever you decide. Which ever way you decide those issues should be.

And it's a hard job you have. I don't envy you. I would not wish to be a juror on a capital murder case. I would not wish to be.

I would ask that considering all the facts, your answered to those special issues is "no." I do not feel the evidence is there to show the deliberate conduct. I don't feel you have heard evidence that should convince you beyond a reasonable doubt – and do you realize that the State still has that burden of proving to you beyond a reasonable doubt.

Now, it isn't a situation where you have to decide that Kent and I should convince you. The State is the one that has to convince you.

[893] If you have a doubt, a reasonable doubt, about the answer to that question, then you should answer that question "no." And I would ask you to do that.

Do not answer those question "yes." Whatever you do decide, we appreciate your concern. We know it's been a long trial.

Many times, I've been up in front of a jury and tell the jurors, you know, thank you for your consideration in this ease; you know, you all are what makes the system work, things like that.

Your decision is a life-and-death matter to Brent Brewer. Thank you.

THE COURT: State may close argument.

STATE'S REBUTTAL ARGUMENT

MR. SHERROD: May it please the Court, ladies and gentlemen, counsel. There's a few words missing up here. Beneath Kristie, you need to put Albert Brewer, and you probably ought to throw in deliberately. You probably ought to throw in no threat to society.

Do you know why? Like this piece of paper, we try to cover the facts up, don't we? Every one of those terms, folks, tries to hide from you [894] what that man did.

I'm no [sic] going to thank you for serving as a juror, because you didn't volunteer. You don't have to thank me, because I do this job. It's my livelihood. You don't have to thank them for representing him. It's a job to be done. It's a job, folks.

You know, you can sit there in your house at night, and you can watch on television terrible crimes that occur in our society today. And it seems to increase. It seems to be going up.

You can sit there, and you can say, what the heck can we do, what can we do? You can do one thing: Perform your job as a juror.

Contrary to what Mr. Daffern would have you believe, I don't have the power to say whether he lives or dies. You don't have the power to say whether he lives or dies. You answer the questions according to the evidence, must like you did at the guilt or innocence. That's all.

It's not a matter of life and death. It's whether it was deliberate. Was this act deliberate? Will he continue to commit violent acts? That's all you answer.

And every one of you people told me you [895] would base that not upon the result, but upon what the evidence dictates you must do.

If you do that and he gets life, a fair trial is had. If you do that and he dies tomorrow, a fair trial was held.

You have to do your job. I have to do mine. And these people have to do theirs. And if everyone does their job, a fair trial results.

Deliberate conduct. You break into a house at night, and one of the people in the house awakes, and you pull a gun and fire one time at an object. Deliberately done? Perhaps not. Intentionally done? No question.

You pull a man's head back, you render him helpless, while this woman holds his right arm, and stab him once, and he lives. You stab him twice, and he lives. And he begs you, "Boy, don't kill me. Boy, don't kill me." And he cuts your throat. Four times. Four times. Whatever it took, this man was going to do.

If it took one, he would have done it. It if took 20, he would have done it. He wanted him dead. He wanted that man dead, right there, right then. Deliberate conduct?

You go to a place, and you try to pick up a [896] woman, and you have a woman approach her. What more better opportunity than to have another young female approach a female to try to get her to give you a ride. Plan it? Deliberate conduct?

You wait until this man goes in, and you climb behind him in the middle of the seat, and the woman gets in the front on the right. And you only go a block. And these predators are upon you –

MR. BIRDSONG: Judge, I've got to object.

MR. SHERROD: – not demanding –

MR. BIRDSONG: More prejudicial than probative.

THE COURT: Overruled.

MR. SHERROD: – not demanding money, but killing you, and then they'll find out what you have on you. Because whatever you've got, they are going to try to take, and they are going to do it quick. That's the sole intent of this whole act, folks.

He may not be smart. He may not have gone through the pockets, he may not have taken the truck, he wanted out. He didn't want to be caught with the weapon. He wanted out. He didn't want to be caught with the truck. He wanted out.

But the act itself, the act of the killing, wanting the money, wanting the man dead, how much [897] more deliberate can you get?

Do you have to carve him up like a slab of beef before a jury will find it's deliberate conduct? No, you shouldn't have to.

Future threat? What kind of man can beat his father with a broom? What kind of man can do that? Not once, not to render him helpless, three or four times, five or six

times. What kind of man can say that he loves a woman and slam her with this kind of force up against a locker?

That ought to tell you one thing: If he will do that to people that he's supposed to love and respect the most in this world, and he will do it to total strangers, there is no more dangerous predator in our society than those kinds. None.

The ones you love, the ones you're supposed to respect, complete strangers for whatever money they have, $140? What kind of people kill for that? The kind that will do it as long as they're alive.

You place him in the penitentiary and someone else will get hurt. I think you know that.

By the time he is 15 years of age, from that time on, he carries weapons, he carries knives. And why does he do it? To hurt people. Do we have to have four, five, six more victims?

[898] I sometimes think that's what our society has gotten to. Not just one poor person. He's dead, we can't bring him back. Everybody makes a mistake once in their life.

That's the attitude this society has gotten to. Everybody is entitled to one little mistake. There's plenty of violence around. What kind of person does that to a man that's willing to give him a ride? What kind of person can sit there, if that person is struggling, and take a knife this close and bury it into his neck and feel that man's blood on his body; and what kind of woman can sit there with his right arm gripped while the blood spurts from his neck into the back of her hair, all over the back of her shirt?

What kind of people do that? What kind of human people can do that?

And, you know, folks, you can take a puppy, and you can beat that puppy and you can make him mean, but if that dog bites, he is going to bite the rest of his life, for whatever reason.

Whatever got him to this point, he is what he is today. And that will never change. That will never change.

All that's happened to this time or all [899] those years cannot change the violence and the cold, cold-bloodedness that he's exhibited right here. Not one tear. Not one tear, because life means nothing to him. Zero.

You go back, you look at the evidence and you decide, not because of a poor family and not because of the survivors, because of the evidence that you see that he has shown.

And what word have you had and heard that assures you he won't continue to do that? Zero. Zero.

Do your job, folks. And if you don't think that's sufficient, then you decide life is going to be the result, if you decide that he will not continue these acts, that there is no evidence showing it, let your conscience answer that "no," let it be done.

But you go back there and look at the wounds it took to kill this man. And if you come back with an answer "no," you're not looking. It's nothing but a sympathetic verdict.

You can't get more deliberate than wanting a man to die for that. If you feel comfortable that he will be walking

in any society, in the penitentiary or anyone [sic] else, and he will not be a [900] continuing threat to whoever is around him, that can be your decision, and you can sleep with it, and we'll live with it.

But base your decision on what's dictated according to the facts and not on what punishment must be assessed.

Do what the facts say, answer the questions according to the law, and a fair trial will be held. Thank you.

THE COURT: The jury may retire and consider your answers to the issues.

(Thereupon, the jury retired to (the jury deliberation room at (3:24 p.m.

* * *

No. 6997-A

X IN THE 47TH DISTRICT COURT
X
X IN AND FOR
X
X RANDALL COUNTY, TEXAS

[Captioned Omitted In Printing]

Now bearing in mind the foregoing instructions, and fully considering all the evidence, presented at both phases of this trial, by either party, the special issues, with forms for your answers, are as follows:

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, BRENT RAY BREWER, that caused the death of the deceased, Robert Doyle Laminack, was committed deliberately and with the reasonable expectation that the death of the deceased would result?

Answer

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

/s/ Jimmy Myers
FOREMAN OF THE JURY

OR

We, the Jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is "No."

FOREMAN OF THE JURY

SPECIAL ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, BRENT RAY BREWER, would commit criminal acts of violence that would constitute a continuing threat to society?

Answer

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

/s/ Jimmy Myers
FOREMAN OF THE JURY

OR

We, the Jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is "No."

FOREMAN OF THE JURY

VERDICT OF THE JURY

We, the jury, having answered the foregoing issues, return the same into Court as our verdict.

/s/ Jimmy Myers
FOREMAN OF THE JURY

FILED IN OPEN COURT
/s/ David L. Gleason
Judge Presiding
Date: 6-1-91 6:50 p.m.

TEXAS COURT OF CRIMINAL APPEALS

BRENT RAY BREWER, Appellant

NO. 71,307 v. Appeal from RANDALL County

THE STATE OF TEXAS, Appellee

OPINION

Appellant was convicted of capital murder pursuant to Tex. Penal Code Ann. § 19.03(a)(2). The jury affirmatively answered the punishment issues and appellant was sentenced to death. Tex. Code Crim. Proc. Ann. art. 37.071(b). Appeal to this Court is automatic. *Id.*, at (h). Appellant raises twenty-five points of error in his original brief and nine points of error in a supplemental brief.[1] We will affirm.

Appellant does not challenge the sufficiency of the evidence. Therefore, we will address only the facts necessary to resolve the points of error.

In point of error one, appellant contends the trial judge erred in permitting the admission of appellant's Florida offense and conviction records into evidence. On appeal, appellant complains that the admission of State's Exhibit 201 violated Tex. R. Crim. Evid. 107, 901, 1001, 1002, and 1003. However, at trial, appellant objected to the introduction of the exhibit because it "cor ains hearsay,

[1] Many of appellant's points are multifarious. However, in the interest of justice, we will address them. *Thomas v. State*, 723 S.W.2d 696, 697, n. 2 (Tex.Cr.App. 1986). We do not suggest that any party should brief this way in the future. *See*, Tex. R. App. P. 74(d); *Russell v. State*, 598 S.W.2d 238, 245 (Tex.Cr.App. 1980) (by presenting multifarious points, appellant risks rejection on ground nothing is presented for review).

contains final judgments, [and] it's improperly bolstering." Since the issue raised on appeal does not comport with appellant's trial objection, nothing is presented for review. *Johnson v. State*, 803 S.W.2d 272, 293 (Tex.Cr.App. 1990); *Thomas v. State*, 723 S.W.2d 696, 700 (Tex.Cr.App. 1986). Appellant's first point of error is overruled.

In his second point of error, appellant contends the trial judge erred by not instructing the jury on the lesser-included offense of murder. Appellant contends the lesser-included offense of murder was raised because Skee Callan's credibility was questionable, a witness saw a person walking near the deceased's vehicle after the crime, and an "unaccounted for" fingerprint was found on the outside of the truck near the driver's door. Appellant asserts this evidence proves another perpetrator must have robbed the victim, therefore, lessening the instant offense to murder rather than capital murder.

In determining whether appellant is entitled to a charge on a lesser-included offense, we consider all of the evidence introduced at trial, whether produced by the State or the defendant. *Goodwin v. State*, 799 S.W.2d 719, 740 (Tex.Cr.App. 1990); *Dowden v. State*, 758 S.W.2d 264, 269 (Tex.Cr.App. 1988). We use a two-pronged test in our review. *Rousseau v. State*, 855 S.W.2d 666 (Tex.Cr.App. 1993); *Goodwin*, 799 S.W.2d at 740-741; *Dowden*, 758 S.W.2d at 268. First, the lesser-included offense must be included within the proof necessary to establish the offense charged. *Id.* Second, there must be some evidence in the record that if the defendant is guilty, he is guilty only of the lesser-included offense. *Id.* The credibility of the evidence and whether it conflicts with other evidence or is controverted may not be considered in determining whether an instruction on a lesser-included offense should

be given. *Marras v. State*, 741 S.W.2d 395, 405 (Tex.Cr.App. 1987).[2]

Murder is a lesser-included offense of capital murder. Art. 37.09(1); *Thomas v. State*, 701 S.W.2d 653, 656 (Tex.Cr.App. 1985). Therefore, appellant has met the first prong of the test. However, appellant fails to meet the second prong. The evidence adduced at trial shows that on April 26, 1990 appellant and Kristie Lynn Nystrom convinced the deceased to give them a ride in his truck. Appellant rode in the back seat. After traveling approximately one block, appellant stabbed the deceased several times in the neck while Nystrom held the deceased's right arm to prevent him from fighting back. The deceased's jeans were pulled down over his buttocks and a blood transfer stain from his wallet was found on his underwear. Nystrom was later seen with the deceased's blood-soaked wallet and truck keys. Further, appellant stated to Skee Callan that he had killed a man for $140 – the same amount of money that the deceased was believed to have at the time of his death. Michelle Francis, appellant's and Nystrom's roommate, testified that neither appellant nor Nystrom had any money earlier that day. However, both were later able to purchase bus tickets to Dallas. After reviewing this evidence, we conclude there is no evidence from which a rational trier of fact could conclude that appellant was guilty only of murder. Even if Callan's testimony is excluded, we conclude that there is no evidence of another perpetrator adequate to warrant a charge on the lesser-included offense of murder. Appellant's second point of error is overruled.

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[2] Overruled on other grounds by *Garrett v. State*, 851 S.W.2d 853, 860 (Tex.Cr.App. 1993).

Appellant's third point of error contends the trial judge erred in admitting blood comparison evidence containing blood taken from appellant pursuant to a search warrant. Appellant contends the search warrant affidavit contained false information and was, therefore, invalid. Specifically, he argues that the affiant, officer Greg Soltis, knowingly misled the magistrate in the first line of paragraph five of his affidavit, which states: "According to the affidavit of [affiant], daughter and employee of the deceased, the deceased was transporting BRENT RAY BREWER and Kristie Lynn Nystrom to the Salvation Army in deceased pickup." The deceased's daughter did not name the passengers in her father's vehicle in her affidavit. Appellant contends that without this misrepresentation the magistrate could not have found probable cause to issue the warrant.

When a police affiant makes statements in a search warrant affidavit which are intentionally false or made with reckless disregard for the truth, the statements must be excised from the affidavit before determining whether the affidavit affords probable cause for the issuance of the warrant. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674 (1978); *Hass v. State*, 790 S.W.2d 609, 611 (Tex.Cr.App. 1990). A search warrant will not issue unless the sworn affidavit sets forth sufficient evidence:

> (1) that a specific offense has been committed, (2) that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched.

Tex. Code Crim. Proc. Ann. art. 18.01(c). We use a "totality of the circumstances" test to determine if probable cause existed to issue the warrant. *See, Illinois v. Gates*, 462 U.S. 213, 238-239, 103 S.Ct. 2317, 2336 (1983); *Green v. State*, 799 S.W.2d 756, 757 (Tex.Cr.App. 1990).

Excising the allegedly false statement, the affidavit sets out the following evidence:

> 2. [Appellant] is currently incarcerated in the Randall County Jail and suit case(s) containing the personal belongings of [appellant] that were with [appellant] at the time of his arrest in Ellis County, Texas, by officers of the Red Oak Police Department, have been transported to the Randall County Sheriff's Department where they have remained unopened since [appellant]'s incarceration.
>
> 3. Affiant was present during the autopsy of [the deceased] performed by [a] forensic pathologist. [The pathologist] told affiant that the deceased . . . died of stab wounds.
>
> 4. Affiant has reviewed the police reports and affidavits of the following witnesses: Anita Lynn Piper; Charlotte Clarkson; Steven Callen III; and Debra Campbell Houston.
>
> 5. Ms. Piper observed a male in the back seat of the deceased club cab pickup and someone else in the front passenger seat of the deceased pickup.
>
> 6. According to the affidavit of Debra Campbell Houston, she observed a pickup parked on 49th Street, Amarillo, Randall County, Texas at approximately 9:28 p.m. This pickup was later identified as the pickup [belonging to the deceased]. [Houston] observed a male slumped over

in the driver's seat, later identified as the deceased. [Houston] further observed a blonde headed person in the pickup.

7. Affiant has received identifying information and clothing [sic] a description of [Nystrom] and [appellant] from Steven Callen III, in which [Callen] verifies that [Nystrom] has blonde hair.

8. According to [Callen], [Nystrom] and [appellant], came to his apartment at 4205 W. 51st Street, Oak Tree Apartments, Amarillo, Texas, the evening of April 26, 1990. [Callen], observed both [Nystrom] and [appellant] to have blood on their persons and their clothing.

9. [Appellant] reported to [Callen], that he [appellant] stabbed the deceased with a knife.

10. [Nystrom] reported the [sic] [Callen], that while [appellant] stabbed the deceased with a knife, she [Nystrom], took control of the steering wheel of the pickup and applied the brake to stop the vehicle.

11. [Callen], observed [Nystrom] to be in possession of a brown wallet that [Nystrom] reported was the wallet of the deceased.

12. According to Charlotte Clarkson, [Nystrom] and [appellant] changed their clothes, that appeared to be stained with blood, at her apartment #217E, located at 4205 W. 51st St., Oak Tree Apartment, Amarillo, Texas, on the evening of April 26, 1990. Affiant has obtained a blood stained diaper from [Clarkson], that [Clarkson] reports was used to wipe blood from the bodies of [Nystrom] and [appellant].

13. [Callen] observed a cut on [appellant]'s hand and drove [appellant] to Palo Duro Hospital for medical attention.

14. [Callen], later drove [Nystrom] and [appellant] to the bus station, in Amarillo, Potter County, Texas, with their suit cases containing their personal belongings, including the blood stained clothing worn during the commission of the offense that [Nystrom] and [appellant] reported to [Callen].

15. Affiant has observed the interior of the pickup of the deceased and area surrounding said pickup. Affiant has further collected blood samples and hair samples and fibers from the interior of deceased pickup as well as the area immediately surrounding the deceased pickup.

16. Affiant has been trained in the identification of blood spatters and blood stain patterns. Affiant has identified a blood stain trail away from the pickup of the deceased and believes that one or both of the suspects were injured during the assault on the deceased.

17. Affiant has further identified blood spatters in the interior of the deceased pickup, as well as, collected body hair from the interior of the deceased pickup.

18. Affiant requests that a warrant be issued authorizing any peace officer to obtain from [appellant]:

(a) blood and saliva samples

(b) search of the suit case(s) in the possession [appellant] and [Nystrom] for clothing containing blood stains, fibers, hairs and other forensic evidence.

Without deciding whether Soltis intentionally misled the magistrate, we find the affidavit in question contains facts sufficient to support a finding of probable cause. The affidavit shows that a specific offense has been committed, that the specifically described property or items that are to be searched or seized constitute evidence of that offense or evidence that a particular person committed that offense, and that the property or items constituting evidence to be searched or seized are located at or on the particular person, place, or thing to be searched. Consequently, the trial judge did not err in admitting the blood comparison evidence. Appellant's third point of error is overruled.

In points of error four and five, appellant contends the trial judge erred in admitting "too many gruesome photographs and videotaped evidence" of the deceased's body and the ensuing crime scene.[3]

Appellant's first contention involves the photographs of the deceased's body at the scene of the crime and at the autopsy. He contends "*any* eighty percent of the photos were too inflammatory, and that any twenty percent of the photos depicting the body and the blood stains were probative enough to prosecute the case."[4] Appellant does not identify which of the "more than 35" photographs he complains of on appeal. At trial, appellant objected to

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[3] Despite the multifariousness of these points and the glaring inadequacy of briefing, in the interest of justice, we will address the merits of appellant's argument. *See, Thomas*, 723 S.W.2d at 697, n. 2; *but see*, Rule 74(d) Tex. R. App. P. Ann.; *Russell*, 598 S.W.2d at 245 (multifarious); *Coble v. State*, ___ S.W.2d ___, ___ (Tex.Cr.App. No. 71,084, delivered Nov. 3, 1993) slip op., pg. 14 (inadequately briefed). *See*, n. 1, *supra*.

[4] Appellant does not challenge the relevancy of these exhibits.

forty-six photographs depicting the deceased and the crime scene.[5] We shall review these photographs for error.

When determining whether the trial judge erred in admitting photographs into evidence, our review is limited to determining whether the probative value of the photos is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. Tex. R. Crim. Evid. 403; *Long v. State*, 823 S.W.2d 259, 271 (Tex.Cr.App. 1991), citing *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex.Cr.App. 1991) (Opinion on Rehearing).

A court may consider many factors in determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. These factors include: the number of exhibits offered, their gruesomeness, their detail, their size, whether they are in color or black and white, whether they are close-up, and whether the body depicted is clothed or naked. *Long*, 823 S.W.2d at 272. However, a court should not be limited by this list; the availability of other means of proof and the circumstances unique to each individual case should also be considered. *Id.*

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[5] Appellant objected at trial to the following: State's exhibits 4, 7, 11, 12, 15, 16, 17, 18, 19, 24, 25, 28, 30, 31, 32, 33, 76, 77, 78, 79, 86, 86-A, 87, 88, 90, 91, 93, 94, 99, and 100 had a "cumulative effect, and the sole purpose . . . is to prejudice the jury." State's exhibits 20, 27, 34, and 35 were introduced solely to prejudice the jury. State's exhibits 21 and 22 were introduced to inflame the jury. State's exhibit 23 was gruesome and more prejudicial than probative. State's exhibits 46, 47, 48, 49, 50, 51, 52, 82 and 82-A were not needed by Dr. Erdmann, the forensic pathologist, to describe the injuries and were only introduced to prejudice the jury.

In reviewing these photographs, we note initially that thirty-nine are 8" x 10" and the remaining seven are approximately 4" x 5". All the photographs are in color. Appellant does not explain why he believes the photographs were inflammatory except to point out that they were cumulative and "particularly gruesome." Nineteen of the photographs are of the deceased, eleven of these at the autopsy. The photos were used at trial to depict the location and condition of the deceased at the crime scene and, at the autopsy, to show the wounds causing death and the defensive wounds on the deceased's hands and knee. Although many of the pictures are gruesome and detailed, they are not enhanced in any way and portray no more than the gruesomeness of the crime scene and the injuries inflicted. *See, Narvaiz v. State*, 840 S.W.2d 415, 429 (Tex.Cr.App. 1992). The remaining twenty-eight photographs depict blood spatters and smears on the interior and exterior of the deceased's truck, accumulated blood in the interior of the truck, blood-latent fingerprints of appellant and Nystrom, and the blood smears and fingerprints on the murder weapon. We do not view any of these photographs to be more gruesome than any other murder scene. Although some of the photographs may seem repetitive, they were used at trial to illustrate the bloodstain pattern analysis and document the location of the bloodstains, followed by closeups to better view the described patterns. After reviewing all of the objected to photographs, we are not persuaded the danger of unfair prejudice substantially outweighed their probative value. Therefore, we hold the trial judge did not err in admitting the exhibits.

Appellant next contends the videotapes, State's exhibits 89-A and 89-B, were cumulative of the photographic

evidence and were more prejudicial than probative.[6] Further, he contends that where portions of the videotape were rewound and replayed, it amounted to bolstering and repetitious testimony. However, appellant did not object on the grounds of bolstering and repetition at trial. Since his trial objection does not comport with the issues raised on appeal, he has preserved nothing for appellate review with respect to these complaints. *Thomas*, 723 S.W.2d at 700; *Johnson*, 803 S.W.2d at 293. Therefore, we will address only appellant's "prejudicial" and "cumulative" arguments.

Because silent videos or "motion pictures" are merely a collection of photographs the rules for admission are the same. *Huffman v. State*, 746 S.W.2d 212, 222 (Tex.Cr.App. 1988). State's exhibit 89-A is a videotape of a trail of blood drops leading away from the scene of the crime, appellant was believed to have been cut during the attack. This video shows the drops of blood and the direction of their trail. It was not cumulative of any photograph or the other video and had no prejudicial effect.

State's exhibit 89-B is a videotape portraying the general overview of what those arriving at the scene observed. It shows the location of the truck, the condition of the ground around and the exterior of the truck, the condition of the interior of the truck and the deceased. The video is probative of the fact and manner of death. *See, Gordon v. State*, 784 S.W.2d 410, 412 (Tex.Cr.App. 1990). Further, the video is not cumulative of the photographic exhibits. The focus of the photographs is isolated and

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[6] The videotapes were admitted prior to the admission of most of the photographs objected to by appellant. *See*, n. 5, *supra*. Both videos were played before the jury with the audio portions deleted.

specific while the video provides a panoramic view of the crime scene, placing the deceased, the weapon and the bloodstains in perspective. The information relayed is different. Admittedly, like the photographs, the video is bloody and gruesome. However, the crime committed was gruesome and the video depicts nothing more than what happened to the deceased. *See, Narvaiz*, 840 S.W.2d at 429. After viewing the tape in its entirety, we conclude that it's probative value is not substantially outweighed by it's prejudicial effect. The trial judge did not abuse his discretion by admitting the videotape of the crime scene.

Appellant's third argument contends he was denied his right to confrontation because of the manner in which State's exhibit 89-B was shown and testified to by Officer Soltis, and that this denied him effective assistance of counsel.[7] At trial, the State introduced State's exhibit 89-B into evidence and Soltis, on direct examination, explained to the jury what they were observing on the videotape. The description was elicited from Soltis in a question/answer manner. Appellant objected that this was narrative and that he was losing his right to confront the witness. The trial judge overruled the objection and reminded appellant that he would have an opportunity to cross-examine Soltis. After a considerable amount of testimony, appellant again objected that he was losing his right to effective assistance of counsel via his right to confrontation of the witness. Further, he stated: "And at the end of this, I'm either going to be forced to go back to form any question to this expert and replay the tape which would just, in my mind, enhance it in front of the jury, or ask no questions." The trial

[7] Appellant did not object at trial to the manner in which State's exhibit 89-A was testified to or shown.

judge then afforded appellant the opportunity to cross examine Soltis as he made his statements. However, appellant took advantage of this on only two occasions. Then, during normal cross-examination, appellant questioned Soltis once concerning the videotape. At the end of his cross-examination, appellant requested that the first seventeen minutes of the video be struck from the record because he had not been afforded the opportunity to cross-examine until after that point. The trial judge overruled the objection. Appellant did not question Soltis further.

A defendant is entitled to a fair opportunity to cross-examine a State's witness. However, the confrontation clause only guarantees an *opportunity* for effective cross-examination. U.S. Const. amend. XI and XIV; Tex. Const. art. I, § 10; *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989 (1987).

The record reveals that appellant was given ample opportunity to cross-examine Soltis concerning the substance of the videotape. Further, appellant did not make it known to the trial judge that he believed that he would have to replay portions of the tape to effectively cross-examine Soltis until after the first seventeen minutes of the tape had played. We cannot conclude the trial judge abused his discretion in overruling appellant's objections. Because appellant was not denied his right of confrontation, we hold appellant was not deprived of effective assistance of counsel. Points of error four and five are overruled.

In points of error six and seven, appellant contends the trial judge erred in allowing Officers Soltis and Bob Henderson to testify as bloodstain experts. Appellant

further asserts that Henderson's testimony was repetitious of the testimony elicited from Soltis.

The special knowledge which qualifies a witness to give an expert opinion may be derived from specialized education, practical experience, a study of technical works, or a varying combination of these things. Tex. R. Crim. Evid. 702; *Holloway v. State*, 613 S.W.2d 497, 501 (Tex.Cr.App. 1981). Whether a witness offered as an expert possesses the required qualifications is a question which rests largely in the trial judge's discretion and the decision to admit or exclude the testimony will not be disturbed absent a clear abuse of discretion. *See, Duckett v. State*, 797 S.W.2d 906, 910 (Tex.Cr.App. 1990).

At trial, appellant objected to Soltis' testimony because he had not yet been qualified as an expert. The State asked various questions regarding Soltis' experience and training in the area of crime scene investigation and bloodstain evidence. Soltis testified he was a detective with the Amarillo Police Department, and had been assigned to the Special Crimes Unit for the previous six and a half years. Soltis processed and recorded crime scenes for the Special Crimes Unit, which required that he photograph and videotape each scene, make sketches of the scene, as well as collect and preserve evidence found at the scene. Soltis attended bloodstain-pattern analysis school held at the Oklahoma City Regional Police Academy. He testified that he paid particular attention to bloodstain and spatter evidence at crime scenes. We cannot conclude the trial judge abused his discretion by allowing Soltis to testify concerning the location and types of bloodstains and spatters found at the scene of the crime.

With regards to Henderson, appellant objected that "under Rule 702 of the Rules of Criminal Evidence [Henderson is] not qualified as an expert." Prior to appellant's objection, the State elicited evidence that Henderson was a crime scene investigator for the Randall County Sheriff's Department. Henderson had over 400 hours of training in crime scene investigation from the Texas Department of Public Safety and the Federal Bureau of Investigation. Further, Henderson attended a bloodstain-pattern interpretation school taught by one of "the foremost bloodstain interpreters in the United States," Captain Bevel. Henderson conducted various experiments in bloodstain interpretation with Bevel and worked on two previous homicide cases with him. Henderson previously testified as an expert in bloodstain interpretation. We cannot conclude the trial judge abused his discretion by determining Henderson was qualified as an expert in the interpretation of bloodstains.

Finally, we cannot conclude Henderson's testimony was repetitious of Soltis'. Soltis' testimony was limited to identifying if a stain was blood, the type of bloodstain, how it would accumulate, and its location at the scene. Henderson's testimony concerned the interpretation of the bloodstain patterns, the process he used to reconstruct the crime, and his subsequent findings. Although Henderson was required to use several of the same exhibits as Soltis, his testimony was not necessarily repetitious. We overrule appellant's sixth and seventh points of error.

In his eighth point of error, appellant contends the trial judge erred in refusing to include, in the jury charge at the punishment phase, an instruction submitting the

third punishment issue.[8] In order to raise the issue of provocation, there must be evidence of the deceased's conduct and that evidence must be sufficient to be considered provocation. *Lucas v. State,* 791 S.W.2d 35, 65 (Tex.Cr.App. 1989); *Hernandez v. State,* 643 S.W.2d 397, 401 (Tex.Cr.App.1982). In the instant case, there was no evidence of any provocation by the deceased. The only evidence of the deceased's conduct immediately prior to his murder was giving appellant and Nystrom a ride and pleading, "Boy, please don't kill me; boy, please don't kill me." The trial judge did not err in refusing the requested instruction. Appellant's eighth point of error is overruled.

In points of error nine, eleven, thirteen, and fifteen, appellant contends the jury charge and the Texas capital sentencing scheme violated the Eighth and Fourteenth Amendments to the United States Constitution and, specifically, *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934 (1989).[9]

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[8] Tex. Code Crim. Proc. Ann. art. 37.071(b)(3) reads:

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

[9] Specifically, appellant's points of error are:

Point of Error Number 9: THE TRIAL COURT REFUSED TO SUBMIT A THIRD SPECIAL ISSUE TO THE JURY WHICH WOULD HAVE REQUIRED THEM TO ANSWER WHETHER THEY FOUND THAT APPELLANT SHOULD RECEIVE A LIFE SENTENCE, RATHER THAN A DEATH SENTENCE; CONSEQUENTLY, APPELLANT'S DEATH SENTENCE IS INVALID BECAUSE THE JURY DID NOT HAVE A VEHICLE TO EXPRESS ITS' REASONED MORAL RESPONSE TO ALL OF THE RELEVANT MITIGATING EVIDENCE

(Continued on following page)

Resolution of these points requires a review of the relevant decisions of the United States Supreme Court. The Supreme Court first considered the constitutionality of Tex. Code Crim. Proc. Ann. art. 37.071 in *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950 (1976). The Court held that art. 37.071 was constitutional when considered with our broad interpretation of the statute. In short, the statute allowed for the consideration of mitigating circumstances through the jury's deliberation on the punishment issues.

In *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954 (1978), the Supreme Court stated, "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a

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IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Point of Error Number 11: APPELLANT'S SENTENCE OF DEATH IS INVALID BECAUSE ARTICLE 37.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE, AS APPLIED IN THIS CASE, LIMITED THE JURY'S CONSIDERATION OF MITIGATING EVIDENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Point of Error Number 13: APPELLANT'S DEATH SENTENCE IS INVALID BECAUSE ART. 37.071(B)(1) IS UNCONSTITUTIONALLY VAGUE, AND AS THAT STATUTE WAS APPLIED TO APPELLANT, THE JURY WAS PRECLUDED FROM GIVING THE TYPE OF INDIVIDUAL CONSIDERATION TO THE MITIGATION EVIDENCE MANDATED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Point of Error Number 15: THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE PUNISHMENT CHARGE AND REQUESTED INSTRUCTION REGARDING THE LAW OF MITIGATING EVIDENCE AS SPELLED OUT IN *PENRY.*

basis for a sentence less than death." *Id.*, 438 U.S. at 604, 98 S.Ct. at 2964-65 (emphasis in original). There must be an individualized consideration of all mitigating factors. However, the weight to be placed upon the mitigating evidence is wholly within the province of the fact finder. *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869 (1982).

In *Franklin v. Lynaugh,* 487 U.S. 164, 108 S.Ct. 2320 (1988), the Supreme Court addressed whether a separate instruction was required for the consideration of mitigating evidence offered during trial. The only evidence offered was Franklin's good behavior during his previous incarcerations. The Court found this type of mitigating evidence could be considered within the scope of the second punishment issue submitted under art. 37.071 and no additional instruction was required.

The following term, in *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, the Supreme Court was presented with evidence of Penry's mental retardation, disadvantaged background and organic brain damage resulting in poor impulse control and an inability to learn from experience. In *Penry,* the Court held art. 37.071 was unconstitutional *as applied* because the statute failed to provide the jury with a vehicle to give effect to the mitigating evidence. *Penry,* 109 S.Ct. at 2949. The punishment issues did not provide a vehicle for the effective consideration of Penry's mitigating evidence – the very nature of Penry's mitigating evidence affirmatively answered the second punishment issue.

Therefore, in addressing these points of error, we must determine: 1) what mitigating evidence was presented to the jury; 2) whether the two punishment issues provided a vehicle for the jury to give effect to that

evidence, and, if not, 3) whether the trial judge provided, in its charge to the jury on punishment, a vehicle for the jury to effectively consider the mitigating evidence. *Joiner v. State,* 825 S.W.2d 701, 706 (Tex.Cr.App. 1992).

Appellant's mitigating evidence, as set forth in his brief and the record, consists of the following:

> 1) Appellant was not mentally retarded, but was involuntarily committed on January 1, 1990, for "major depression, single episode, without psychotic features, polysubstance abuse." The examining physician based his opinion on a suicide note appellant wrote to his mother. On January 25, appellant signed a request for voluntary admission to Big Springs State Hospital for fourteen days.[10]
>
> 2) Appellant came from an abused background where he was ignored by both his father and step-father. He did not have a relationship or live with his real father until after he was fifteen-years old.[11] Appellant's father hit him on several occasions, once with the butt of a pistol and once with a flashlight. Appellant's father frequently beat his mother. Appellant's father had once told him, "If you ever draw your hand back, you'd better kill me because I'll kill you."
>
> 3) Appellant had smoked marijuana when he was a teenager.

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[10] As discussed in point of error sixteen, *infra,* appellant chose not to enter the records from Big Spring State Hospital into evidence.

[11] Appellant did see his biological father when he was five months old and for a short period of time when he was five years old. There is no evidence of abuse during either of these encounters.

We conclude the second punishment issue provided an adequate vehicle for the jurors to give effect to appellant's mitigating evidence. We have held a stay in a mental hospital does not evidence a "long term mental illness which would affect appellant's ability to conform to the requirements of society." *Joiner,* 825 S.W.2d at 707. As in *Joiner,* the evidence shows no more than appellant's threat to commit suicide and a stay at a hospital on one occasion. *Id.* Further, appellant's evidence of drug abuse and an abusive homelife was given effect within the scope of the punishment issues. *Ex parte Ellis,* 810 S.W.2d 208, 211-212 (Tex.Cr.App. 1991) (drug addiction); *Goss v. State,* 826 S.W.2d 162, 166 (Tex.Cr.App. 1992) (abusive household).

We hold the trial judge properly refused appellant's requests for an additional instruction; that the second issue provided a vehicle for the jury to express its reasoned moral response to appellant's mitigating evidence; and, that art. 37.071 was not unconstitutional as applied to appellant because the jury was given a vehicle to consider the mitigating evidence. Points of error nine, eleven, and fifteen are overruled.

Additionally, in his thirteenth point of error, appellant makes the argument that art. 37.071(b)(1) is vague and unconstitutional as applied to him; and it prevented the jury from being able to consider any mitigating circumstances in answering the first punishment issue. As noted above, the punishment issues provided an adequate vehicle for the consideration of appellant's mitigating evidence. However, we will address appellant's vagueness argument.

Art. 37.071(b)(1) provides:

> (b) On consideration of the presentation of the evidence, the court shall submit the following three special issues to the jury:
>
> > (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result.

On appeal, appellant specifically contends the first punishment issue is a bifurcated question which would allow a juror to answer differently the terms "deliberately" and "with the reasonable expectation." He argues that because "with a reasonable expectation" can be equated with the term "knowingly," jurors will almost always answer "yes" to that term. Further, he contends that if two questions were not intended by the legislature, then "with the reasonable expectation" impermissibly modifies "deliberately" by lessening the State's burden of proof on the issue. However, in appellant's pre-trial motion to declare art. 37.071(b)(1) unconstitutional, he states that the section is vague only because "deliberately" is not statutorily defined for the jury which, therefore, allows "with the reasonable expectation" to modify or define "deliberate."

To determine whether a criminal statute is unconstitutional for vagueness, we must scrutinize the statute to determine whether it is impermissibly vague as applied to the defendant's conduct. *Motley v. State,* 773 S.W.2d 283, 287 (Tex.Cr.App. 1989). The trial judge instructed the jury on the first punishment issue as follows:

> You are instructed that, as used in the first special issue, the word "deliberately" has a

> meaning different and distinct from the word "intentionally," as that word was previously defined in the charge at the guilt/innocence phase of the trial. You will recall that the word "intentionally" as defined in the charge at the guilt/innocence phase of the trial was defined as follows: a person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscience objective or desire to engage in the conduct or cause the result. The word "deliberately", as used in the first special issue, means a manner of doing an act characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences; willful, slow, unhurried, and steady as though allowing time for a decision.
>
> You have already found that the defendant acted intentionally in committing capital murder. The first special issue requires you to determine whether defendant's conduct in causing the death of the deceased was also committed deliberately, as that term has now been defined for you. If you believe that the defendant acted intentionally, but you have a reasonable doubt whether his conduct was also deliberate, you will answer the first special issue "no."

The trial judge defined "deliberately" as requested by appellant and instructed the jury on the burden of proof for the first punishment issue. We cannot conclude that art. 37.071(b)(1) was unconstitutionally vague as applied to appellant or that the State's burden of proof was lessened. Point of error thirteen is overruled.

In points of error ten, twelve, and fourteen, appellant contends the jury charge at punishment violated the

Texas Constitution. However, appellant offers no authority or argument explaining the protection offered by the Texas Constitution or how that protection differs from the U.S. Constitution. We decline to make appellant's Texas Constitutional arguments for him. Rules 74 and 210 Tex. R. App. P. Ann.; *Johnson v. State,* 853 S.W.2d 527, 533 (Tex.Cr.App. 1992); *McCambridge v. State,* 712 S.W.2d 499, 501-02, n. 9 (Tex.Cr.App. 1986). Points of error ten, twelve, and fourteen are overruled.

In point of error sixteen, appellant contends the trial judge erred in refusing to allow appellant to make an offer of proof or bill of exception of certain medical records. Specifically, appellant wished to preserve certain *Penry* evidence for appeal, but did not wish to introduce that evidence before the jury. The trial judge stated he would allow appellant's records from Big Spring State Hospital to be offered to the jury. However, appellant declined, stating:

> I know you will, but I don't desire to. I'm going to tender this as a Bill of Proof No. 1. And the reason I'm tendering it like this is so it will go up for appellate purposes.
>
> There are Penry items in here, but from a tactical standpoint, we do not wish to tender this evidence in, but I want the appellate courts to understand that there was Penry materials. And for tactical purposes, attorneys decided not to offer it to the jury.

The trial judge again stated the evidence could be offered to the jury and appellant again refused, stating he did not wish for any psychiatric records to be placed before the jury. Appellant then cited *Ex parte Goodman,* 816 S.W.2d 383, 386, n. 6 (Tex.Cr.App. 1991), as authority for his contemporaneous offer of proof. After a careful review of

our opinion in that case, the trial judge denied appellant's request.

Appellant's reliance on *Goodman* is misplaced because *Goodman* is a decision on a pre-*Penry* case. *Goodman,* 816 S.W.2d at 384. Goodman stated his mitigating evidence was tactically withheld because presentation of that evidence would only aggravate his punishment since the jury had no means to consider it as mitigating under art. 37.071(b). *Id.* at 386, n. 6. Goodman's trial occurred in 1981, eight years prior to the decision in *Penry.* As the instant trial occurred in 1991, appellant had no tactical reason to withhold his hospital records because he would be receiving full benefit of the *Penry* decision.

Further, offers of proof and bills of exception are devices used to preserve error when a trial judge *excludes* evidence. Tex. R. App. P. 52(b); Tex. R. Crim. Evid. 103(a)(2). The trial judge in the instant case did not exclude evidence; on the contrary, the trial judge would have permitted appellant to offer the evidence. Absent an adverse ruling by the trial judge, appellant was not entitled to have his evidence included in the appellate record by an offer of proof or bill of exception. Point of error sixteen is overruled.

In his points of error seventeen through thirty-four, appellant contends the trial judge erred at voir dire. The record indicates appellant exhausted his peremptory challenges and was granted two additional peremptory challenges. After his request for more peremptory challenges was denied, appellant identified veniremember Spear as the objectionable juror who was seated on the jury. Error, if any, has been preserved. *Demouchette v. State,* 731 S.W.2d 75, 83 (Tex.Cr.App. 1986). However,

because the trial judge granted appellant two additional peremptory challenges, we cannot reverse appellant's conviction unless he demonstrates the trial judge erred in the treatment of *three* of the contested veniremembers. *Rector v. State,* 738 S.W.2d 235, 247 (Tex.Cr.App. 1986).

In nine points of error (points seventeen through twenty-five), appellant contends the trial judge erred in overruling his challenges for cause because those respective veniremembers held prejudices against aspects of the law upon which he was entitled to rely. *See*, Tex. Code Crim. Proc. Ann. art. 35.16(c)(2). In each instance, appellant used a peremptory strike to exclude the veniremember.

The denial or grant of a challenge for cause is within the discretion of the trial judge, and will not be overturned absent an abuse of discretion. *Mooney v. State,* 817 S.W.2d 693, 701 (Tex.Cr.App. 1991). We examine the record as a whole to determine whether there is support for the trial judge's decisions, and, in doing so, give great deference to the trial judge. *Satterwhite v. State,* 858 S.W.2d 412, 415 (Tex.Cr.App. 1993). This is especially true when we are faced with a vacillating or equivocating veniremember. *Id.* The trial judge is able to consider important factors such as demeanor and tone of voice that do not come through when reviewing a cold record. *Mooney,* 817 S.W.2d at 701.

In points of error seventeen through twenty, appellant contends veniremembers Marlow, Stout, Mahaffey, and Holeman could not distinguish between the terms "deliberate," as used in the first punishment issue, and "intentional," the culpable mental state of the crime:

Veniremember Marlow:

APPELLANT: Well, before you had the chance to hear the prosecutor's definitions, in your mind, was there a distinction between "deliberate" and "intentional"?

MARLOW: Probably not. You know, a fine point there, I would consider it.

* * *

APPELLANT: Mr. Marlow, all kidding aside, before you came in today, approximately an hour ago, you had about 50-some odd years of thinking that "intentional" and "deliberate" were the same thing, correct?

MARLOW: Yes.

* * *

APPELLANT: Would you agree with me, sir, that it would be real hard to set your feelings aside that you established over that many years and actually make that distinction between "deliberate" and "intentional"? Wouldn't that be real hard for you?

MARLOW: Not if it's pointed out to me the term at the time of what the definition is at the Court proceedings as being "deliberate" and "intentional." If the court itself comes out and says these are two different meanings, and it's explained to me why they have two different meanings, and if the evidence shows one way or the other, then I could eliminate my past definitions.

* * *

APPELLANT: You would require a definition of "deliberate"? Is that what I heard you say?

MARLOW: Yes.

Veniremember Stout:

APPELLANT: Do you feel that a deliberate act is always intentional?

STOUT: I think so.

* * *

APPELLANT: Can you envision of a case that after you've already found that he intentionally and knowingly caused the death, do you feel like you'd be obligated to answer that issue "yes" regarding "deliberately" or would you require more evidence to get to the "deliberately"?

STOUT: I think I'd probably need some more evidence.

* * *

APPELLANT: The deliberate conduct, are you saying that you can't envision circumstances where you could not find that this conduct was deliberate even though you've already found that it wasn't intentional?

STOUT: No. I think I'm – I still think you'd have to have deliberate conduct.

APPELLANT: Okay. So there, you're saying there is an extra amount that has to be brought in?

STOUT: Right.

APPELLANT: And you can envision a set of facts that would require more than just the intentional?

STOUT: I think you're going to have to have more than the intentional.

Veniremember Mahaffey:

STATE: Would you agree with me that that [sic] intent to do that act could be formed immediately?

MAHAFFEY: Yes, sir.

STATE: Do you see a distinction between that and the definition that I gave you for "deliberately"?

MAHAFFEY: Yes.

STATE: What distinction do you find in those two words, please, sir?

MAHAFFEY: I don't suppose any.

* * *

STATE: The legislature has – has told us that in the first phase of this trial, our – the single issue that they want us to consider is whether or not the Defendant's conduct was intentional.

Then we come along to the second phase of the trial and they've inserted the word "deliberately." And evidently, they want us to find a distinction between those two words. So that's what I'm asking you now, sir, is do you find a distinction between those two words?

MAHAFFEY: They seem sort of synonymous to me. One means about the other, I think.

* * *

STATE: Let me ask you if the concept that I told you about the pencil and my ability to break that instantly with intent, you agreed to that, didn't you?

MAHAFFEY: Yes.

STATE: Then the definition to "deliberately" includes the terms "Not rash or hasty, but to consider and reason a reason for a thing or against the thing."

Would you concede that "deliberately" seems to require a little more thought than the thought required to do it instantly as you agree with on the intent?

MAHAFFEY: Yes.

STATE: So then, my question where I asked you if in order to find something deliberately, you're going to require a little more, then now, would you change your answer to say that it would require a little more thought than intent?

MAHAFFEY: Well, by the definition you gave me, I guess so. I would have to change my – change my original answer to that.

STATE: So you're telling the Court now that you do see a distinction between "intentionally" and "deliberately"?

MAHAFFEY: Yes.

* * *

APPELLANT: How is "deliberately" different there from the "intentional" that you've already found, or is it?

MAHAFFEY: It's a fine line, but I believe what he said earlier, that when you do it in – formed in a hasty way, I believe, hastily done.

* * *

APPELLANT: Okay. If you've already found a person guilty of capital murder, have you already found that he acted deliberately?

MAHAFFEY: I suppose so.

APPELLANT: Okay. So in answering that special Issue No. 1, would it be a fair statement to you that as far as the question goes: Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death to the deceased would result? Are you going to answer that question "yes" if you found the person guilty of capital murder?

MAHAFFEY: If there's no doubt about it, yeah.

Veniremember Holeman:

APPELLANT: Now, that first special issue that you have to answer, do you find from the evidence beyond a reasonable doubt the conduct of the defendant that caused the death of the deceased was committed deliberately and with he [sic] reasonable expectation that the death of the deceased would result. If you had found that a person acted intentionally, would you automatically answer that question "yes"?

* * *

HOLEMAN: Yes, I would.

* * *

APPELLANT: And is that true because deliberately and intentionally are just so close together?

HOLEMAN: I think that's probably the situation, intentionally and deliberately. Intentionally –

APPELLANT: Do you feel like they are just so similar that you have trouble seeing the difference?

HOLEMAN: Well, if he had intent in his heart –

APPELLANT: Okay.

HOLEMAN: – to do that. If it was – well, I'm afraid they would be very close, intentionally and deliberately. Deliberately is – oh, goodness. Intentionally is just maybe the circumstances just arose all of a sudden. Deliberately is where it would be very, I think, premeditated, a plan that had been worked out.

* * *

APPELLANT: My whole problem is, if you found a person guilty of intentionally taking the life of another, would you automatically just answer that question –

* * *

Answer that first special issue, that first special issue.

HOLEMAN: I would answer that "yes."

APPELLANT: And that's because – well, – and I'[m] not trying to put words in your mouth, either, but I'm asking you, is it because the deliberately and intentionally are so similar to you that you feel like you cannot really see the distinction?

HOLEMAN: I guess it is, because intentionally means to me that thought was there.

* * *

STATE: And that's a specific definition that we have. You're not going to have to worry about what your feeling is of intentionally, but with that definition that says nothing about deliberations, nothing about preplanning, nothing about planning, can you see the distinction in that term as legally defined to you and the belief in the definition that you have in the term deliberate? Can you see a difference?

HOLEMAN: I can see a difference, but you had to bring that. In my mind, they were very close together, but now – I can see what you are –

* * *

STATE: Can you see the difference between the terms in your own mind right now?

HOLEMAN: When you – yes, I can.

* * *

TRIAL JUDGE: Before ruling, I think I'll inquire one more time.

After you have found someone guilty of intentionally causing the death of another, then you are asked a question, was his conduct deliberate.

> Would you automatically answer that question yes because you had found it intentional, or would you require something more?
>
> HOLEMAN: I would require something more, because intentional is not the same as deliberate.

Appellant challenged each of the veniremembers for cause on the grounds that they equated the statutory meaning of "intentionally" with the term "deliberately" and, therefore, would automatically affirmatively answer the first punishment issue. *See*, art. 37.071(b)(1).

A reading of the entire voir dire for each veniremember shows that initially the veniremen misunderstood the law regarding "intentional" and "deliberate." However, after the terms were explained, each demonstrated they could distinguish between them. The trial judge did not err in overruling appellant's challenges for cause. Points of error seventeen, eighteen, nineteen, and twenty are overruled.

In points of error twenty-one through twenty-five, appellant contends that veniremembers Meador, Shmidl, Glasson, Mahaffey, and Holeman could not consider the full range of punishment for the lesser-included offense of murder.[12] To be qualified veniremembers must be able to consider the full range of punishment applicable to the offense submitted for their consideration. *Fuller v. State*, 829 S.W.2d 191, 200 (Tex.Cr.App. 1992). A person who cannot consider probation as a proper punishment for the lesser-included offense of murder is subject to a challenge for cause. *Pierce v. State*, 696 S.W.2d 899, 902 (Tex.Cr.App.

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[12] In his supplemental brief, appellant discusses jurors that do not exist in the instant case. We will apply appellant's argument to the jurors whose testimony he has set out.

1985). However, a veniremember is not required to state that he could consider a probated sentence for the offense of murder in a particular factual situation. *Faulder v. State*, 745 S.W.2d 327, 339 (Tex.Cr.App. 1987). Further, the law does not require the trial judge to exclude a veniremember simply because he cannot think of a set of facts where it would be proper to give the minimum sentence. *Hogue v. State*, 711 S.W.2d 9, 27 (Tex.Cr.App. 1986).

Defense counsel asked each of the prospective veniremembers whether they could consider five-years probation for someone found guilty of murder. Each at one point said that they could not. However, each of the veniremembers also stated that they could consider and recommend five-years probation depending on the facts and circumstances of the case. No veniremember unequivocally stated that he could consider probation in *only* a mercy killing. After reviewing the voir dire of each of these veniremembers, we conclude the trial judge did not err in overruling appellant's challenges for cause. Points of error twenty-one, twenty-two, twenty-three, and twenty-five are overruled.

In point of error twenty-four, appellant also contends the trial judge erred by denying the challenge for cause of veniremember Mahaffey because he could not consider a life sentence for capital murder. Although Mahaffey stated that he would prefer the death penalty in a capital murder case, he further stated:

> A. It would be hard to – hard to give them life in the pen unless I knew all the circumstances where – give me a specific example –
>
> * * *

> Q. I'm just asking you would there ever be a situation where in your basic beliefs that a person who you found guilty of capital murder should receive a life [sic] in the penitentiary sentence rather than a death sentence?
>
> A. Well, there might be, sure.
>
> * * *
>
> Q. Okay, Would your personal views influence your decision in answering those special issues? And if you want me to, I'll read them again to your.
>
> A. I'll say no. I'll try not to let them.

The fact that Mahaffey could not think of a set of facts where life imprisonment would be proper does not disqualify him from service as a juror. In *Hogue*, we stated:

> . . . The law does not permit the exclusion of a prospective juror because he or she cannot think of a set of facts where it would be proper to give a life sentence in a capital case. Rather, [Tex. Code Crim. Proc. Ann. art. 35.16(c)(2)] provides that a juror may be challenged for cause by the defense if "he has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely. . . . " . . . *The inability to articulate a set of facts where a life sentence was the proper punishment does not show an inability to consider the full range of punishment.*

Hogue, 711 S.W.2d at 27. The trial judge did not abuse its discretion by overruling appellant's challenge for cause. Point of error twenty-four is overruled.

In nine points of error (points twenty-six through thirty-four, respectively), appellant contends the trial

judge erred by refusing to allow appellant to ask nine veniremembers proper questions during voir dire, thereby preventing the intelligent use of his peremptory strikes.

In *Nunfio v. State*, 808 S.W.2d 482 (Tex. Cr. App. 1991), we held:

> The standard of review in a case where the defendant claims he was improperly restricted on voir dire is whether the trial court abused its discretion. The propriety of the question which the defendant sought to ask is determinative of the issue. We have held that a question is proper if it seeks to discover a juror's views on an issue applicable to the case.

Id., 808 S.W.2d at 484 (citations omitted). *See also*, *Woolridge v. State*, 827 S.W.2d 900, 904 (Tex.Cr.App. 1992). The denial of a proper question during voir dire is always reversible error and is not [sic] be subject to a harm analysis under Tex. R. App. P. 81(b)(2). *Nunfio*, 808 S.W.2d at 485.

In point of error twenty-six, appellant attempted to ask the following question of veniremember Mahaffey:

> Well, we'll talk about a hypothetical case. I'm not talking about this case. Let's just say [sic] a hypothetical case you found a person guilty of committing a murder which is the knowing and intentional taking of the life of another *while in the course of committing robbery.*
>
> Would there ever be an instance in a case like that where you feel like that life imprisonment would be the proper punishment?

The State objected stating that appellant was attempting to bind Mahaffey to specific facts involving a robbery/ murder.

After the trial judge sustained the State's objection, the trial judge allowed appellant to question Mahaffey:

> Q. Well, not talking about that kind of a capital murder. You can have a capital murder that a person intentionally – *any capital murder.* We'll just say any case that's capital murder that you found somebody guilty of, do you fell [sic] like it would ever be proper in a capital murder case like that for a person to get life in the penitentiary rather than death?

Because the trial judge allowed this question, which was designed to determine Mahaffey's ability to consider the full range of punishment, we hold in light of the entire record, the trial judge did not improperly restrict appellant's voir dire. Finding no abuse of discretion, point of error twenty-six is overruled. See, *Allridge v. State*, 762 S.W.2d 146, 163-64 (Tex.Cr.App. 1988).

In point of error twenty-seven, appellant contends the trial judge erred by preventing appellant from asking veniremember Holeman questions concerning the range of punishment. The complained-of question asked:

> Okay. There are – I like to say there are about three groups of people who fall in three different categories in regards to their beliefs about a capital murder.
>
> And the first group, I feel like, those people, they believe like if somebody proved that a person had intentionally taken the life of another, for example, while in the course of committing a

robbery, which is capital murder, then they feel like that person should forfeit his life.

There's another group of people that feel like that if a person has intentionally taken the life of another, for example, while in the course of committing a robbery, then, depending on the facts and circumstances, possibly he should forfeit his life, or possibly should get life in prison.

And there's another group of people pretty much that feel like that if a person has, you know, knowingly and intentionally taken the life of another, for example, while committing robbery, then he should never, you know, forfeit his life, but – they just don't believe in the death sentence at all.

What group would you fall in?

After the State's objection to this question was sustained, appellant explained to Holeman the ways capital murder may be committed. Appellant then questioned Holeman:

Q. . . . My question to you was, going back to those three groups of people, there's one group of people that believes anyone who has knowingly or intentionally taken the life of another and then committed a capital murder – and I won't, you know, pin it down to any one kind – should either forfeit his own life, that's the first group.

Or the second group would be, depending on the facts, he may forfeit his own life or he, you know, may just go to the penitentiary for life.

Or the third group just never believes that you should [sic] ever take a person's life. They just believe in that person going to, you know, the penitentiary for life.

Now, my question to you, which one of those groups would you put yourself in?

A. Group two.

We hold, in light of the entire record, appellant's voir dire of Holeman was not improperly limited and the trial judge did not abuse his discretion. *See*, *Allridge*, 762 S.W.2d at 163-64. Point of error twenty-seven is overruled.

In point of error twenty-eight, appellant contends the trial judge erred by limiting appellant's voir dire concerning future acts of criminal violence:

> APPELLANT: Okay. Let me – let me just give you an example and ask you about that. And what I'm trying to do is see if you can make a determination between violent acts and non-violent acts.
>
> And let's say a person has – the proof showed – and I'm just talking about an example, I'm not talking about any specific case now.
>
> A person had been to the penitentiary for three sentences and the first sentence was for possession of marijuana, and the second time he went to the penitentiary was for auto theft, and the third time he went was for burglary.
>
> Now would that be a different set of facts to predict his future criminal acts of violence than if he had been convicted of, say, a crime of a serious threat to take a person's life?
>
> STATE: Same objection, Your Honor, the State again would object that the Defense Counsel is attempting to get a commitment from this juror on how he would rule on specific evidence. We

> urge the court that it's highly improper for him to do so.
>
> TRIAL JUDGE: Sustain the objection.
>
> APPELLANT: I would cite the Court to the *[Felder] v. State*, 758 2d 760 for that very question.
>
> * * *
>
> TRIAL JUDGE: The objection to the last question is sustained insofar as trying to bind the juror to the particular set of facts. Perhaps you can rephrase.

In support of this point of error appellant contends we approved the same question in *Felder v. State*, 758 S.W.2d 760, 763 (Tex.Cr.App. 1988). Felder contended the trial judge erred in failing to excuse a veniremember who could not set aside strong feelings on parole. *Id.*, 758 S.W.2d at 766. We held that "if a potential juror is unable to disregard parole in determining the issues as to punishment and unable to take the oath of a juror, he is subject to exclusion upon proper challenge." *Id.* Therefore, *Felder* is not controlling.

In *White v. State*, 629 S.W.2d 706 (Tex.Cr.App. 1981), the defendant attempted to question a veniremember on his ability to render a life sentence under facts similar to the case on trial. The trial judge sustained the State's objection to the question but the defendant was permitted to question the veniremember whether he could render a life sentence "if it were proved that a defendant shot someone in the head in the course of committing robbery." *Id.*, 629 S.W.2d at 706. We held the trial judge did not abuse his discretion in refusing to allow the first question and noted "the question that was permitted had more

details than the appellant was entitled to ask." *Id.* This is because:

> It is proper to use hypothetical fact situations to *explain* the application of the law. However, it is improper to inquire how a venireman would respond to particular circumstances as presented in an hypothetical question.

Cuevas v. State, 742 S.W.2d 331, 336, n. 6 (Tex.Cr.App. 1987).

In the instant case appellant was attempting to commit the veniremember to the facts stated in the hypothetical question. In other words, appellant wished to commit the juror to what constitutes a violent act. This is improper.[13] *Allridge*, 762 S.W.2d at 163-64. We hold the trial judge did not abuse his discretion. Point of error twenty-eight is overruled.

In point of error twenty-nine, appellant contends the trial judge improperly limited his voir dire of veniremember

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[13] In *Allridge*, we quoted directly from 23 Tex.Jur.3d, Criminal Law, § 2668, pp. 308-09:

> A juror may not be asked on voir dire what he would or would not do at any particular stage of the proceeding under a given state of facts. He may, of course, be interrogated touching his views of the law and the application to any fact situation that the evidence may present. Although allowing questions designed to ascertain the jurors views and sentiments on social and moral subjects generally, the courts do not permit a hypothetical case to be submitted; nor do they allow questions designed to bring out the juror's views on the case to be tried. To put into the inquiry a case, whether entirely hypothetical or the one to be presented by the questioner on the trial, is objectionable because the juror would thereby practically be pledged to a particular finding in advance of hearing the testimony.

Groppe concerning the meaning of criminal acts of violence:

> APPELLANT: Okay. And do you feel like automatically that all crimes would be criminal acts of violence?
>
> GROPE [sic]: No.
>
> APPELLANT: Can you define how you understand criminal acts of violence to be, what you would understand that term to –
>
> STATE: Your Honor, I'm going to object. I think the context that that statement was made in would be the witness may well think that he's trying to find out what specific acts constitute and I would object to it on that basis.
>
> TRIAL JUDGE: Sustained.

We agree the trial judge improperly sustained the State's objection. However, appellant was allowed to question Groppe as follows:

> APPELLANT: Ma'am, I'm not trying to do that, and maybe that's a bad question. The point I was trying to get at is to make certain that you could distinguish between violent acts and nonviolent criminal acts.
>
> * * *
>
> APPELLANT: Do you distinguish that there is a difference between violent criminal acts and nonviolent criminal acts?
>
> GROPE [sic]: Yes, I do. You could hit a child with a car and that's a criminal act, but it's not a violent intentional act.

In light of the appellant's additional questions, the sustaining of the State's objection did not improperly restrict appellant's voir dire of Grope [sic]. Point of error twenty-nine is overruled.

Appellant alleges in this thirtieth point of error that the trial judge improperly restricted appellant from questioning veniremember Clark concerning criminal acts of violence. Appellant asked the following:

> Okay. And listen, I'm not trying to get you to, you know, guess or anything like that. My question to you: Before you can answer [special issue 2], would you have to have evidence of something other than just the mere offense before you could answer that?

The State objected that appellant was requiring Clark "to designate a specific type of requirement on the evidence." The trial judge sustained the objection.

Generally, it is improper to ask a veniremember to set hypothetical parameters for their decision-making. *Allridge v. State*, 850 S.W.2d 471, 480 (Tex.Cr.App. 1991). However, the question in the instant case speaks to the juror's definition of reasonable doubt.[14] We have held on many occasions that the evidence of a capital murder may be sufficient to sustain an affirmative answer to the second punishment issue. *See*, *Burns v. State*, 761 S.W.2d 353 (Tex.Cr.App. 1988); *Bell v. State*, 724 S.W.2d 780, 803 (Tex.Cr.App. 1986); *Landry v. State*, 706 S.W.2d 105, 113 (Tex.Cr.App. 1985); *and*, *Muniz v. State*, 573 S.W.2d 792,

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[14] Appellant's trial occurred prior to our opinion in *Geesa v. State*, 820 S.W.2d 154 (Tex.Cr.App. 1991), where we adopted a definition for reasonable doubt.

794 (Tex.Cr.App. 1978). Further, in *Garrett v. State*, 851 S.W.2d 853 (Tex.Cr.App. 1993) we considered whether a juror who would require more evidence than the capital murder to answer the second punishment issue is properly excused. *Id.*, 851 S.W.2d at 859. We held:

> . . . a particular juror's understanding of proof beyond a reasonable doubt may lead him to require more than the legal threshold of sufficient evidence to answer the second special issue affirmatively. There is nothing unlawful about that; in fact, quite the opposite. As the trial judge himself explained . . . an individual juror must determine what proof beyond a reasonable doubt means to him, for the law does not tell him . . . . "

Id., 851 S.W.2d at 859. Appellant's question in the instant case sought to explore the veniremember's definition of reasonable doubt. In light of our holding in *Garrett*, we cannot say this is improper. Therefore, we hold the trial judge abused his discretion in restricting appellant's voir dire in this area. Point of error thirty is sustained.

In point of error thirty-one appellant contends the trial judge erred in refusing to allow appellant to question veniremember Eller with a hypothetical fact situation explaining the State's burden of proof. The record reveals the following:

> APPELLANT: Okay. Mr. Eller, just a couple more questions I want to visit with you about on technicalities.
>
> You understand – have you ever sat on a jury before?
>
> ELLER: Civil jury.

APPELLANT: Civil jury? Okay. In a criminal case, there is an indictment and the charging instrument. The Judge visited with you about that a little bit.

ELLER: The indictment?

APPELLANT: Yeah.

ELLER: He did.

APPELLANT: Do you understand that that is made up of elements and they have to be proven to you by the State beyond a reasonable doubt.

ELLER: Right.

APPELLANT: And I want to do a hypothetical situation wherein the State alleged in their indictment that X defendant killed Bambi by taking Bambi's life with a knife. That's what they alleged in the indictment.

The prove [sic] shows that Bambi died, Bambi was killed by X defendant, but X defendant did it with a gun. Do you follow me?

ELLER: Yes.

APPELLANT: The State has failed to prove to you an element in their indictment. Are your feelings such that – regarding technicalities, that if the State had proved that the death occurred, it was a murder, but it was the wrong weapon, wrong instrument was used, would you be able to follow the law?

STATE: Your Honor, I'm going to object at this point. He's trying to bind the juror to a particular fact situation, and it's improper voir dire.

TRIAL JUDGE: Sustained.

APPELLANT: Do you understand that the State has got to prove those elements to you beyond a reasonable doubt?

ELLER: Right.

APPELLANT: If a situation arises where one element is not proven, do you understand what you would have to do?

ELLER: Well, I think as a juror, I've got to express his opinion as far as meeting with the other jurors, if there is a decision to be made in that.

APPELLANT: My question to you is, can you follow the law and vote accordingly if that element is not proven to you beyond a reasonable doubt?

ELLER: Yes.

APPELLANT: My concern is, based on – you know, I'm hearing some personal feelings of bias, I think, and I – this is not a criticism in any sense of the word, I feel the same way about a lot of things, but I can't do my job, and you wouldn't want me to allow a juror to be seated if I was defending you that was going to place a lesser burden upon the State because they thought loopholes were being used wrongfully. Do you follow me?

ELLER: Yes, I understand what you're saying.

APPELLANT: Do you think you have a bias towards the State in any sense of the word?

ELLER: Towards the State?

APPELLANT: Yes.

ELLER: As far as – what do you mean there?

APPELLANT: That you would lessen their burden of proof.

ELLER: I don't think so. The only bias that I have is what I expressed awhile ago, as far as the judicial system as it sits today.

That there has been abuse with some laws that were originally established to protect the defendant, that have been skirted and used to water down the justice system.

* * *

THE COURT: What I need to know from you, though, is can you follow the law as it exists and as I instruct you, applying that to the evidence that you hear and make your decision only on that?

ELLER: I think I can do that as you instruct me to do it.

On appeal, appellant contends his hypothetical question was a proper inquiry into applicable law including the presumption of innocence and burden of proof under *Homan v. State*, 622 S.W.2d 372 (Tex.Cr.App. 1984). In *Homan*, the defendant contended the trial judge erred in denying a challenge for cause against a juror who "felt the indicted defendant was 'just a little bit guilty of something' and that it would take evidence to remove that feeling from his mind." *Id.*, 622 S.W.2d at 274. We reversed holding the trial judge erred in failing to sustain Homan's challenge for cause. *Id.* Thus *Homan* is not controlling. However, we agree appellant's use of the hypothetical fact situation in this case was used to explain the State's burden of proof. Thus the hypothetical fact situation was

proper and the trial judge abused his discretion in refusing appellant's question "[W]ould you be able to follow the law?" *Cuevas*, 742 S.W.2d at 336, n. 6. However, the record reveals appellant rephrased his question several times and was able to elicit the veniremember's response. In light of appellant's subsequent questions, and the veniremember's responses, we cannot say the trial judge improperly restricted appellant's voir dire. Point of error thirty-one is overruled.

In point of error thirty-two, appellant contends the trial judge did not allow appellant to question veniremember Marlow concerning mitigating evidence:

> APPELLANT: Mr. Marlow, what does "mitigating evidence" mean to you?
>
> MARLOW: I can't remember how I wrote it down there. I would just consider evidence that is questionable that might create a less severe situation or less severe charge or something like that regarding the case.
>
> APPELLANT: Can you articulate any factors that you would consider mitigating?

The State objected that appellant was attempting to bind the juror to specific evidence and the trial judge sustained.

The permissible areas of questioning the panel in order to exercise peremptory challenges "are broad and not to be unnecessarily limited." *Smith v. State*, 513 S.W.2d 823, 826 (Tex.Cr.App. 1974). In *Shipley v. State*, 790 S.W.2d 604 (Tex.Cr.App. 1990), the murder defendant sought to discover whether any veniremember had known someone harmed by an extramarital affair. *Id.*, 790 S.W.2d at 606. This inquiry was relevant because evidence was adduced

at trial that Shipley "was involved in two extramarital affairs shortly before he shot his wife." *Id.*, 790 S.W.2d at 609. We distinguished *White*, holding "the questions that was disallowed by the trial court would not have committed the jurors to a specific finding at trial." *Id.*, 790 S.W.2d at 608. Further, we found that the veniremembers' answers to the question were relevant to "an intelligent use of peremptory challenges." *Id.* 790 S.W.2d at 609.

As opposed to the questions in point of error twenty-eight and thirty, we do not believe appellant's question here was designed to bind Marlow to specific evidence. Rather, appellant's question sought to explore appellant's views and sentiments regarding mitigating evidence. Further, we believe the Marlow's answer to the appellant's question was relevant to appellant's intelligent determination whether to use a peremptory strike. Point of error thirty-two is sustained.

In point of error thirty-three, appellant sought to determine Kasper's attitude towards parole:

> APPELLANT: Would it make a difference in your answers to the special issues that we've talked about already, the fact that a possible life sentence would mean he might be – the Defendant might get out on parole? Would that cause you to answer those questions somewhat differently?

The State immediately objected and stated that the juror would receive an instruction that she was not to consider parole for any purposes when assessing punishment, and, therefore, the question was improper as posed. The trial judge sustained the objection. "The matter of parole is not a proper consideration for jury deliberation on punishment in a capital murder trial." *Jones v. State*, 843 S.W.2d 487, 495 (Tex.Cr.App. 1992). Further, appellant was allowed to

rephrase the question and elicit Kasper's feelings regarding parole. In light of the record, the trial judge did not abuse his discretion. Point of error thirty-three is overruled.

Finally, in point of error thirty-four, appellant contends the trial judge erred by sustaining the State's objection to a question posed to veniremember Hines:

> APPELLANT: Okay. My question to you: Could you ever give a person probation who you had found guilty of murder in any fact situation, other than a mercy killing?

The State objected that appellant was attempting to bind Hines "inversely to a particular fact situation." We agree. As stated before, it is improper to limit questions to a specific fact situation. *Allridge*, 762 S.W.2d at 163-64. The trial judge did not abuse his discretion. Point of error thirty-four is overruled.

We have sustained points of error thirty and thirty-two. However, because the trial judge granted appellant two additional peremptory challenges, this case may not be reversed. *Rector v. State*, 738 S.W.2d 235 (Tex.Cr.App. 1986); *see also*, *Gardner v. State*, 730 S.W.2d 675, 690, n. 9 (Tex.Cr.App 1987). Finding no reversible error, we affirm the judgment of the trial court.

BAIRD, Judge

Clinton, J., concurs in the result.
(Delivered June 22, 1994)
En Banc
Do Not Publish

NO. 6,997-A

EX PARTE	)(	IN THE
BRENT RAY BREWER,	)(	47TH DISTRICT COURT
APPLICANT	)(	IN AND FOR
	)(	RANDALL COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICATION FOR WRIT OF HABEAS CORPUS, FOLLOWING CAPITAL MURDER CONVICTION AND DEATH SENTENCE

(Filed Oct. 20, 2000)

On this 20th day of October, 2000, the Court enters the following findings of fact and conclusions of law concerning Applicant Brent Ray Brewer's "Application for Writ of Habeas Corpus by a Person in State Custody, Application for Stay of Execution and Evidentiary Hearing."

Findings of Fact

1. Applicant's trial counsel, C.R. Daffern, advised Applicant not to submit to a psychological or psychiatric evaluation.

2. Attorney Daffern counseled against Applicant being evaluated by a psychiatrist or psychologist for these reasons:

(a) Nothing about Applicant's behavior caused suspicion about his mental health status;

(b) Under then-controlling law, a mitigation special issue on punishment

could be submitted only when: (1) the accused had a limited intellectual functioning or brain defect and (2) that condition had a proven nexus with his commission of the crime so as to reduce his moral blameworthiness. The predicate for the punishment mitigation special issue was absent in this case. The Court advised Daffern at trial that a punishment mitigation special issue would not be given. (c) Presenting expert psychiatric and psychological evidence could be a "double edged sword" in that negative information about Applicant could be exposed and exploited by the prosecution. Possibly the jury would consider such evidence adversely to Applicant in answering the "future danger" punishment special issue

3. Attorney Daffern discussed with Applicant the relative value of developing expert psychological or psychiatric evidence. Applicant concurred with Daffern's advice that developing such evidence would not be in Applicant's best interest.

4. Habeas counsel's consultant, Nueces County medical examiner Dr. Lloyd White, examined the autopsy findings of Dr. Ralph Erdmann, the State's testifying pathologist in Applicant's trial. Dr. White's review consisted of examining Dr. Erdmann's autopsy protocol and photographs of the victim during the autopsy and the knife used in the offense. Dr. White excepted to some of the terminology Dr. Erdmann used in the autopsy protocol, and to Dr. Erdmann's opinion the victim's neck had been stretched. However, Dr. White concurred with Dr. Erdmann's conclusions

regarding wound location and cause of death: Dr. White agreed also that the wounds could have been caused by the alleged murder weapon.

5. Habeas counsel's consultant C.A. Everhart, an investigator with the Oklahoma Indigent Defense System, investigated the background of Dr. Erdmann. The information Everhart exacted, even if supported by the live testimony of the persons he interviewed, is insufficient to disprove Dr. Erdmann's qualifications or status.

6. Habeas counsel's consultant, Ronald Singer, concurred in part with the testimony of the State's blood spatter witnesses Bob Henderson and Greg Soltis. However, Singer expressed that certain spatter patterns also could have resulted from alternative scenarios not mentioned by Soltis or Henderson. Singer also questioned the adequacy of Soltis' and Henderson's training to qualify them as blood spatter experts. Nothing in Singer's letter opinion contradicts Soltis' and Henderson's testimony.

7. Skee Callen, in his August 13, 1997 affidavit, maintained that Kristie Nystrom had told him she had stabbed the victim, although he had not testified to Nystrom's telling him that. However, Callen persisted in stating that Applicant, too, confessed to stabbing the victim.

8. Applicant has not credibly suggested the prosecuting authority in Applicant's case suppressed information having potential for impeachment of Dr. Erdmann.

9. During the trial of this cause, evidence was adduced that Applicant had bragged about the offense. Other evidence evinced that Applicant's only showing of emotion during the trial was

when his father testified at the punishment phase. In his punishment argument, the prosecutor rhetorically asked whether the jurors during the trial had seen any indication of Applicant's remorse. The remark referred to the evidence of Applicant's expressions to others, and his impassive mien in court, signifying his cavalier attitude about the offense.

Conclusions of Law

1. The advice of Applicant's trial counsel that Applicant not develop expert psychiatric or psychological punishment evidence resulted from counsel's reasoned strategic analysis. Counsel was not ineffective in so advising Applicant.

2. The matters Applicant presents in the affidavits appended to his Application for Writ of Habeas Corpus do not amount to "new evidence." Instead, affiants Dr. White and Ronald Singer merely offer opinions which differ from those of Dr. Erdmann and Bob Henderson on noncritical issues in the case. Similarly, the matters about which Skee Callen avers in his new affidavit are not inconsistent with Applicant's guilt. Even taken as true, the matters Applicant here presents do not show clearly and convincingly that no reasonable juror would have convicted him in light of the new information.

3. Applicant's due process rights were not violated, because he has not credibly suggested any State's witness gave false or misleading testimony.

4. The prosecutor did not comment on Applicant's failure to testify.

5. The punishment special issues submitted were an adequate vehicle for the jury's consideration of the mitigating evidence Applicant presented.

6. The Texas capital murder sentencing scheme, in which the trial court sentences a capital murder convict based upon the jury's answers to special issues submitted, is constitutionally valid.

Recommendation

This Court recommends to the Court of Criminal Appeals that the Application for Writ of Habeas Corpus by a Person in State Custody, Application for Stay of Execution and Evidentiary Hearing be denied.

SIGNED this 20th day of October, 2000.

/s/ David L. Gleason
David L. Gleason
Judge, 47th District Court

50 S.W.3d 492

Court of Criminal Appeals of Texas.
Ex parte **Brent** Ray **BREWER**, Applicant.
No. 46,587-01.

Jan. 31, 2001.

Appeal from 47th District Court, Randall County, David L. Gleason, Judge.

Rick Keffler, Amarillo, for appellant.

John L. Owen, Special Prosecutor, Amarillo, State's Atty., Austin, for the State.

ORDER

The order was delivered PER CURIAM.

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.071, tex.Code Crim.Proc.

On June 1, 1991, applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, tex.Code Crim.Proc., and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Brewer v. State,* No. 71,307 (Tex.Crim.App., delivered June 22, 1994) (nonpublished).

Applicant presents eight allegations in his application in which he challenges the validity of his conviction and resulting sentence. The trial judge entered findings of fact and conclusions of law and recommended that relief be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We adopt the trial judge's findings and conclusions. Based upon the trial court's findings and conclusions and our own review, the relief sought is denied.

PRICE, J., filed a dissenting opinion joined by JOHNSON and HOLCOMB, JJ.

PRICE, J., filed a dissent to the order dismissing the Application, in which JOHNSON and HOLCOMB, JJ., joined.

The applicant alleges that his trial counsel did not provide effective assistance of counsel because counsel failed to request the services of a mental health expert to examine the applicant in preparation for trial. Because I believe that the applicant presents a claim that is – at the very least – worth looking at more closely, and because the majority fails to file and set this case for further review, I dissent.

The test for ineffective assistance of counsel is contained in the Supreme Court's opinion in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ineffective assistance of counsel is shown when "counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 687, 104 S.Ct. 2052. There are two components to this test: (1) deficient performance and (2) prejudice.

Deficient performance consists of acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *Id.* at 690, 104 S.Ct. 2052. In reviewing the acts and omissions of counsel appellate

courts must be highly deferential. *Id.* at 689, 104 S.Ct. 2052. We must judge counsel's performance from the totality of the representation and not on isolated instances in the record. *Id.*

There are certain minimum standards that counsel must meet, however. In *Ex parte Welborn,* 785 S.W.2d 391 (Tex.Cr.App.1990), we explained that:

> It is evident that a criminal defense lawyer must have a firm command of the facts of the case as well as governing law before he can render reasonably effective assistance of counsel. *Ex Parte Ybarra,* 629 S.W.2d 943, 946 (Tex.Cr.App.1982); *Ex Parte Duffy,* 607 S.W.2d 507, 516 (Tex.Cr.App.1980). A natural consequence of this notion is that counsel has the responsibility to seek out and interview potential witnesses. *Ex Parte Duffy,* 607 S.W.2d at 517. It may not be argued that a given course of conduct was within the realm of trial strategy unless and until the trial attorney has conducted the necessary legal and factual investigation which would enable him to make an informed rational decision. 607 S.W.2d at 526. Counsel has a duty to bring to bear such skill and knowledge as will render the trial a "reliable adversarial testing process." 466 U.S. at 688, 104 S.Ct. at 2065, 80 L.Ed.2d at 694.

Id. at 393 (citations omitted) (emphasis added). In other words the presumption of reasonable trial strategy does not attach *unless and until* counsel has conducted the necessary factual and legal investigation.

The second component of ineffective assistance of counsel is shown when there is a reasonable probability of a different result if counsel had not performed deficiently. *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to

undermine confidence in the outcome." *Id.* Therefore, when counsel's deficient performance undermines our confidence in the outcome of the trial, we must reverse the decision and remand for a new trial.

When the law is applied to the facts of this case, I think that the majority is incorrect in concluding that the applicant has not alleged a meritorious claim. Trial counsel in this capital case failed to procure the services of a mental health expert who could have examined the applicant in preparation for trial. In an affidavit, counsel explained his reasons for not doing so.

> (a) Nothing about the Applicant's behavior caused suspicion about his mental health status;
>
> (b) Under then-controlling law, a mitigation special issue on punishment could be submitted only when: (1) the accused had a limited intellectual functioning or brain defect; and (2) that condition had a proven nexus with his commission of the crime so as to reduce his moral blameworthiness. The predicate for the punishment mitigation special issue was absent in this case. The Court advised Daffern [counsel] at trial that a punishment mitigation special issue would not be given.
>
> (c) Presenting expert psychiatric and psychological evidence could be a "double edged sword" in that negative information about Applicant could be exposed and exploited by the prosecution. Possibly the jury would consider such evidence adversely to Applicant in answering the "future danger" punishment special issue[.]

Findings of Fact and Conclusions of Law, *Ex parte Brewer,* No. 46,587-01. These reasons do not justify the complete

failure to investigate the applicant's mental condition in preparation for trial.

Trial counsel claims that nothing about the applicant's behavior caused suspicion about his mental health status, but the applicant had been committed to a mental hospital for severe depression only three months before the instant offense occurred. This is sufficient to alert trial counsel that there may have been some mental health issues. Moreover, the Supreme Court in *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), explained that when the defendant's mental condition is relevant to his guilt and punishment, "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal a defense." *Id.* at 80, 105 S.Ct. 1087. This is especially true in a capital case when the jury decides whether the defendant will live or die based on its answers to questions about the deliberateness with which the defendant committed the offense and the defendant's potential for future dangerousness. *See id.* at 83-84 & 86-87, 105 S.Ct. 1087.

In his second and third reasons for not hiring a mental health expert, counsel cites concerns about whether he could get a mitigation instruction from the trial judge and whether the evidence of the appellant's mental health condition would have been double-edged. But how does counsel know whether there is a legitimate basis for requesting a mitigation instruction or if there is double-edged evidence if he has not had the applicant examined? There is no indication from the record that trial counsel was, himself, a mental health expert who was capable of making such determinations. For these purposes, counsel was a layperson and should have relied on someone with mental health expertise. Also, an offer of proof about the applicant's mental condition could have

served as the basis for a claim on appeal had the trial judge erroneously denied a mitigation instruction in the jury charge.

The most compelling reason for finding trial counsel's performance deficient is that mental health evidence is useful beyond a mitigation special issue. The jury did receive instructions on future dangerousness and the deliberateness with which the offense was committed. And an expert can assist trial counsel in challenging the State's experts during the punishment phase. If the examination had revealed negative evidence that would have been harmful to the applicant and not helpful, then trial counsel could have decided not to present that evidence at trial. That would have prevented the State's exploitation of the evidence. But by deciding before an investigation, trial counsel made an uninformed decision that a majority of this Court endorses with its decision.

Prejudice results from counsel's deficient performance when the deficient performance is sufficient to undermine the outcome of the trial. The result of an examination of the applicant after his trial demonstrates prejudice.

Dr. Mark Cunningham, a board certified forensic psychologist examined the applicant in 1996. His conclusions after examining the applicant, conducting interviews with third parties, and reviewing the applicant's history are as follows:

> 1. It is unlikely that Brent's [applicant's] conduct in the offense was committed deliberately as this terms [sic] is defined in the Jury Instructions. His psychological, emotional, and interpersonal deficits at the time of the offense represented an active impediment to "careful and

thorough consideration; characterized by awareness of the consequences; willful, slow, unhurried, and steady as though allowing time for decision."[1]

2. The probability that Brent would engage in future acts of criminal violence that would constitute a continuing threat to society while in prison is considered to be quite low. (1.61 offenses per 100 capital offenders per year). Further, this probability is substantially less than that represented by inmates systemwide in the Texas prison system. Brent would not, then, be expected to be a disproportionate risk of violence in prison.

The probability that Brent would commit future acts of criminal violence that would constitute a continuing threat to society if paroled after serving a capital life sentence is also considered to be low.

3. The techniques and research literature necessary to reach the above conclusions were available in May 1991 at the time of Brent's trial.

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[1] At the time of the applicant's trial the special issues were:

(1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result.

(2) Whether there was a reasonable probability that the defendant would commit criminal acts of violence that would constitute s continuing threat to society.

Deliberately was defined as "a manner of doing an act characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences; willful, slow, unhurried, and steady as though allowing time for decision."

Application for Appellant, Exhibit 1, *Psychological Evaluation of Factors relevant to Capital Sentencing,* at 47, *Ex parte Brewer,* No. 46, 587-01.

Evidence that was highly relevant to the special issues and that could have been presented at trial was available. Dr. Cunningham's conclusions were not based on a mitigation special issue, but on the special issues that actually were presented to the jury in the applicant's trial. The jury did not have the benefit of this evidence when it decided the special issues. I think the majority is wrong to not grant the relief requested and, especially, to not file and set this ground for review for briefs and a closer look by the entire Court.

Although the applicant's trial counsel failed to develop and present evidence that was relevant to the special issues that the jury used to sentence the applicant to death, the majority puts its stamp of approval on the applicant's death sentence without further inquiry. Counsel's omission undermines confidence in the result of the punishment phase of the applicant's trial. I dissent.

2004 WL 1732312

United States District Court,
N.D. Texas, Amarillo Division.
Brent Ray **BREWER**, Petitioner,
v.
Douglas DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Defendant.
No. Civ.A.2:01-CV-0112-J.

Aug. 2, 2004.

Michael D. Samonek, Law Office of Michael D. Samonek, Dallas, TX, Rick Keffler, Law Office of Richard A. Keffler, Amarillo, TX, for Petitioner.

Edward L. Marshall, Office of the Texas Attorney General, Austin, TX, for Respondent.

Governor of Texas, Office of the Governor, Austin, TX, pro se.

Attorney General, State of Texas, Austin, TX, pro se.

Director Texas Department of Corrections, Director Texas Department of Criminal Justice, Huntsville, TX, pro se.

Warden TDCJ, Huntsville, TX, pro se.

Clerk of US Court of Appeals, New Orleans, LA, pro se.

Clerk Supreme Court, Supreme Court of the United States, Office of the Clerk, Washington, DC, pro se.

Governor, Austin, TX, pro se.

Attorney General of Texas, Austin, TX, pro se.

* * Capital Litigant * *

ROBINSON, J.

MEMORANDUM OPINION AND ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Brent Ray Brewer, an inmate in the custody of the Texas Department of Criminal Justice, Correctional Institutions Division, was convicted by a jury and sentenced to death for the 1990 capital murder of Robert Doyle Laminack.[1] Petitioner filed this petition for writ of habeas corpus pursuant to Title 28, United States Code, Section 2254.[2] Additional briefing was ordered by the Court following the Supreme Court's recently clarified standards affecting certain death penalty cases in *Tennard v. Dretke*, ___ U.S. ___, 124 S.Ct. 2562, 159 L.Ed.2d 384,

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[1] *State v. Brewer*, No. 6,997-A (47th Dist. Ct., Randall County, Tex. June 1, 1991). The case was appealed to the Texas Court of Criminal Appeals, which affirmed the conviction and death sentence. *Brewer v. State*, No. 71,307 (Tex.Crim.App.1994) (unpublished). Petitioner filed a petition for writ of certiorari to the Supreme Court, which was denied on March 20, 1995. *Brewer v. Texas*, 514 U.S. 1020, 115 S.Ct. 1367, 131 L.Ed.2d 223. Petitioner subsequently filed a state application for writ of habeas corpus on April 23, 1997. The trial court entered findings of fact and conclusions of law and recommended that relief be denied on October 20, 2000. *Ex parte Brewer*, No. W-6,997-A-1 (47th Dist. Ct., Randall County, Tex.) The Court of Criminal Appeals adopted those findings of fact and conclusions of law and denied relief in a written order on January 31, 2001. *Ex parte Brewer*, 50 S.W.3d 492 (Tex.Crim.App.).

[2] Petitioner filed his original federal petition for writ of habeas corpus on May 7, 2001, and his amended petition for writ of habeas corpus on September 30, 2002. Respondent filed an answer with brief in support on June 28, 2001, and furnished the state court records. Respondent did not file an amended answer in response to the amended petition.

2004 WL 1402731 (June 24, 2004). Applying those standards, the Court concludes that there was constitutional error in the penalty phase of the trial in which the jury answered the two questions presented to it, known as special issues, in a way that mandated the death penalty. The special issues asked of the jury did not give the jury a vehicle to give effect to the mitigating evidence presented at the trial.

I.

FACTUAL BACKGROUND

On April 26, 1990, Petitioner and Kristie Lynn Nystrom convinced Robert Laminack to give them a ride to the Salvation Army, and Petitioner rode in the back seat of Laminack's truck. After traveling approximately one block, Petitioner stabbed Laminack several times in the neck while Nystrom held the victim's right arm to prevent him from fighting back. Petitioner and Nystrom then took the victim's wallet and approximately $140.00 in cash.

At trial, witnesses testified that Petitioner was emotionally and physically abused by his father, that he suffered severe depression, and that just three months before the murder, Petitioner was committed to a psychiatric hospital where he fell under the influence of his co-defendant who dominated and manipulated him.

Petitioner did not know his father until he was fifteen years old. After his father, Albert, reconciled with Petitioner's mother, Karon, Albert abused both Karon and Petitioner. Karon testified that Albert hit Petitioner numerous times with items such as the butt of a pistol, a flashlight, and his fists. During one episode, Albert tried to hit Petitioner with a stick of firewood. When Albert went

outside to get the firewood, Karon slammed the front door and locked it. After Albert busted the glass out of the front door with the firewood, Karon called the police and Albert was arrested.

Petitioner witnessed the physical abuse of his mother by his father. Petitioner would get between his parents. At one point, Albert, a Vietnam veteran who suffers from post-traumatic stress disorder and depression, stated, "If your (sic) ever draw your hand back, you'd better kill me, because I'll kill you." There followed a violent confrontation with his son that landed Albert in the hospital. In his testimony, Albert conceded that Petitioner was only seeking to protect his mother by getting into a fight between Albert and Karon and stopping Albert's attack, which included throwing chairs at Karon. Albert acknowledged that the incident was his fault and that he needed to be stopped. He testified that Petitioner was distraught over the injuries which he had caused his father. Despite the testimony by Albert, the prosecution used this incident in its closing argument as an example of how Petitioner might pose a continuing threat to society.

Petitioner became severely depressed and just three months before the murder of Robert Laminack he was involuntarily committed to a psychiatric hospital after making suicide threats. While undergoing treatment, Petitioner met Kristie Nystrom, a topless dancer who was three years his senior and a patient in the hospital. He became obsessed with Nystrom. After being discharged from the hospital, Petitioner continued to have a romantic relationship with Nystrom and lived with her. Several witnesses testified that Petitioner, who was 19 years old at the time of the offense, was dominated and controlled by Nystrom – that Nystrom had some kind of hold over him.

One witness testified that the murder was Nystrom's idea and described Nystrom as a person who controlled situations and dominated Petitioner. Another witness testified that Petitioner would do whatever Nystrom wanted him to do.

Petitioner's trial counsel submitted no fewer than seven proposed instructions designed to give effect to mitigating evidence. Most of them were designed to make use of the two special issues mandated by state law. However, one included an entirely separate proposed special issue on mitigation evidence. Each of these requests was denied.

During closing argument, Petitioner's trial counsel urged the jury to consider the effect of its answers to the special issues, and attempted to fit the evidence into those issues despite the absence of an instruction on mitigating evidence. The prosecution then argued that the jury does not "have the power to say whether [Petitioner] lives or dies. You answer the questions according to the evidence, must (sic) like you did at the guilt or innocence. That's all. It's not a matter of life and death." Following an admonition by the prosecutor to not deliver a "sympathetic verdict," the jury retired to deliberate.

On state habeas review, the trial court found that delving into additional mitigating evidence would have had a "double edged sword" effect. In other words, exploration of additional mitigating evidence may have had only an aggravating effect. Despite the apparent awareness of this dilemma, the trial court continued to assert that a mitigating evidence instruction was not necessary.

II.

STANDARD OF REVIEW

The standard of review in federal habeas proceedings is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), which provides, in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in a State court proceeding.

Because the petition in this case was filed after April 24, 1996, the above-cited provision of the AEDPA applies to those claims that were adjudicated on the merits. *Lindh v. Murphy,* 521 U.S. 320, 326-27, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). "Resolution on the merits" in the habeas corpus context is a term of art that refers to the state court's disposition of the case on substantive rather than procedural grounds. *Green v. Johnson,* 116 F.3d 1115, 1121 (5th Cir.1997).

Section 2254(d)(1) concerns pure questions of law as well as mixed questions of law and fact. *Martin v. Cain,* 246 F.3d 471, 475 (5th Cir.2001), *cert. denied,* 534 U.S.

885, 122 S.Ct. 194, 151 L.Ed.2d 136 (2001). Under the "contrary to" clause, a federal habeas court may grant the writ of habeas corpus if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decides a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor,* 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). With respect to the "unreasonable application" clause, a federal court may grant a writ of habeas corpus if the state court identifies the correct governing legal principle from the United States Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Id.* Under *Williams,* a state court unreasonably applies Supreme Court precedent if it "unreasonably extends a legal precedent from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.*

Section 2254(d)(2) concerns questions of fact. *See Moore v. Johnson,* 225 F.3d 495, 501, 504 (5th Cir.2000), *cert. denied,* 532 U.S. 949, 121 S.Ct. 1420, 149 L.Ed.2d 360 (2001). Under § 2254(d)(2), federal courts must give deference to state court findings unless they were "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *Chambers v. Johnson,* 218 F.3d 360, 363 (5th Cir.2000) (as modified on denial of rehearing), *cert. denied,* 531 U.S. 1002, 121 S.Ct. 508, 148 L.Ed.2d 473 (2000). The resolution of factual issues by the state court is presumptively correct and will not be disturbed unless the prisoner rebuts the presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

III.

EXAMINATION OF THE ISSUE WARRANTING RELIEF

A. Failure to Properly Instruct the Jury on Mitigation

In his sixth claim for relief, Petitioner complains that the trial court's refusal to allow a special issue or instruction on mitigating evidence violated his rights under the Eighth and Fourteenth Amendments. This claim was argued to the trial court, the Texas Court of Criminal Appeals, and again during the state habeas proceedings and is therefore properly before this Court.

The trial court instructed the jury in accordance with Art. 37.071 of the Texas Code of Criminal Procedure (Vernon 1991) as follows:

> Special issue No. 1
>
> Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, BRENT RAY BREWER, that caused the death of the deceased, Robert Doyle Laminack, was committed deliberately and with the reasonable expectation that the death of the deceased would result?
>
> Special issue No. 2.
>
> Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, BRENT RAY BREWER, would commit criminal acts of violence that would constitute a continuing threat to society?

Before trial, Petitioner's attorney filed a number of motions for instructions and a special issue to give effect to mitigating evidence. In light of the Supreme Court's

decision in *Tennard,* the jury should have been instructed on mitigating evidence.

In *Jurek v. Texas,* 428 U.S. 262, 272, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Supreme Court upheld the Texas statutory special issues in the punishment phase of capital trials upon the premise that these special issues would be construed broadly enough to include proper mitigation evidence.[3] However, in *Penry v. Lynaugh,* 492 U.S. 302, 322, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (*"Penry I"*), the Supreme Court held that the two special issues alone were inadequate to allow the sentencing jury a vehicle to give effect to the mitigating evidence admitted regarding Penry's mental retardation and severe child abuse.

Following *Penry I,* the Fifth Circuit Court of Appeals developed a two-part test for determining whether a defendant's evidence requires a special mitigation instruction: "We 'must determine (1) that the proffered evidence was constitutionally relevant mitigating evidence, and, if so, (2) that the proffered evidence was beyond the 'effective reach' of the jurors.'" *Smith v. Cockrell,* 311 F.3d 661, 680 (5th Cir.2002), *cert. dism'd, Smith v. Dretke,* ___ U.S. ___, 124 S.Ct. 1652, 158 L.Ed.2d 263 (2004) (quoting *Madden v.*

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[3] In *Jurek,* the Supreme Court observed that "the Texas statute does not explicitly speak of mitigating circumstances" in the special issues submitted to the jury. The Court further stated,

> The Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as "criminal acts of violence" or "continuing threat to society." In the present case, however, it indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show.

Jurek, 428 U.S. at 272.

Collins, 18 F.3d 304, 308 (5th Cir.1994)). Whether certain evidence qualified as "constitutionally relevant" mitigating evidence depended on whether the criminal act was "due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own." *Graham v. Collins,* 950 F.2d 1009, 1029 (5th Cir.1992) (en banc), *aff'd on other grounds,* 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993). In order to determine whether the evidence in question rose to that level, courts considered four inquiries corresponding to "four principles found in *Penry I:* voluntariness, permanence, severity, and attribution. Did the defendant acquire his disability voluntarily or involuntarily? Is the disability transient or permanent? Is the disability trivial or severe? Were the criminal acts a consequence of this disability?" *Robertson v. Cockrell,* 325 F.3d 243, 251 (5th Cir.2003) (en banc), *cert. denied,* 539 U.S. 979, 124 S.Ct. 28, 156 L.Ed.2d 691 (2003).

The Supreme Court's *Tennard* decision rejected the Fifth Circuit's application of *Penry.* Tennard presented evidence at his trial that he had an IQ of 67. The trial court did not instruct the jury on mitigating evidence and Tennard was sentenced to death. The federal district court denied Tennard's habeas petition on the *Penry* issue and denied a certificate of appealability. The Fifth Circuit affirmed the denial of a certificate of appealability in light of its *Penry* jurisprudence. The Supreme Court reversed, holding that Tennard was entitled to a certificate of appealability and clarifying the standards for the application of *Penry.*[4]

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[4] Respondent does not argue that Petitioner's claim is barred by the non-retroactivity doctrine discussed *infra,* Sec. IV(A). Any such argument would be without merit. *Tennard* was a clarification of *Penry,*

(Continued on following page)

The first question addressed in *Tennard* is the relevance of mitigating evidence. ___ U.S. ___, ___, 124 S.Ct. 2562, 159 L.Ed.2d 384, ___, 2004 WL 1402731, *7-*8. "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" *Id.* at *8 (quoting *McKoy v. North Carolina,* 494 U.S. 433, 440, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990)). The evidence Petitioner presented at trial – his abused childhood, his severe depression, his involuntary commitment shortly before the murder, and his domination by Kristie Nystrom – fits within this expansive definition. This evidence is the sort that "might serve 'as a basis for a sentence less than death.'" *Id.* (quoting *Skipper v. South Carolina,* 476 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)).

The special issues presented to the jury in Petitioner's trial tracked the same language that was used in the trials of Tennard and Penry. *Id.* at *3-*4. In both cases, the petitioners presented relevant mitigating evidence. In *Penry I,* the Supreme Court concluded that those special issues were an inadequate vehicle for the jury to give effect to that relevant mitigating evidence. *Id.* at *4. The same is true in Petitioner's case. Respondent argues that evidence of treatable mental illness or drug abuse is within the scope of the special issues presented to the jury. This may be true where there are issues of impulse control

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a case already decided at the time of Petitioner's trial. Moreover, whether an individual is entitled to a jury instruction on mitigating evidence implicates the exceptions to the non-retroactivity doctrine. *See Penry I,* 492 U.S. at 330; *Bell v. Cockrell,* 310 F.3d 330, 331-32 (5th Cir.2002).

that could be characterized as going to deliberateness. The evidence presented by Petitioner does not fall in this category. The other possibility is future dangerousness. Again, the evidence at Petitioner's trial does not fit squarely there either. One could view the evidence as either aggravating or mitigating. Without the guidance of a proper instruction from the court, the jury was not given an opportunity to consider it as mitigating.

The mitigating evidence presented may have served as a basis for mercy even if a jury decided that the murder was committed deliberately and that Petitioner posed a continuing threat. Without an instruction, much less a special issue on mitigation, this evidence was out of the jury's reach. Given the nature of the mitigating evidence before the jury and the lack of any instruction on mitigation, there is a reasonable likelihood that the jury applied its instructions in a way that prevented the consideration of the mitigating evidence. Reviewing the evidence in light of the special issues, a jury would be very hard pressed to see the evidence presented as anything but aggravating. Failure to submit an instruction on mitigation evidence was an unreasonable application of federal law and Supreme Court precedent. Accordingly, habeas relief on this issue is conditionally granted.

IV.

EXAMINATION OF THE OTHER ISSUES PRESENTED

In his amended petition, Petitioner raises eight broad issues in ten claims for relief: ineffective assistance of counsel, newly discovered evidence of actual innocence, suppression of exculpatory evidence, improper jury argument by the

prosecutor, denial of a mitigation instruction at the punishment phase of his trial, misleading jury instructions regarding the procedure for assessing death sentence, complaints against the federal habeas-corpus process, and cumulative error. Petitioner also contends that he is entitled to discovery and an evidentiary hearing.

In his answer to the original petition, Respondent stated that the claims raised in the petition appeared to have been exhausted. Therefore, he did not request that any of those claims be dismissed or denied on exhaustion grounds. However, Respondent has not affirmatively waived this requirement, 28 U.S.C. § 2254(b)(3), nor has he addressed the new claims raised in the amended petition.

Having considered the one issue that merits relief, the Court will briefly address the other issues presented. These other issues are either not properly before the Court or lack merit.

A. Non-Retroactivity

Petitioner's second claim for relief asserts that there is newly discovered evidence that Petitioner did not cause Mr. Laminack's death and that due process requires consideration of that evidence. Petitioner's seventh claim is that his Sixth Amendment right to trial by jury was violated by the state statutory scheme of special issues because it misleads the jury about their responsibility in making the determination to assess the death sentence. Respondent asserts that Petitioner's second and seventh claims are barred under the federal non-retroactivity doctrine announced in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). "A threshold issue in

every case is . . . whether the court is obligated to apply the *Teague* rule to the defendant's claim." *See Caspari v. Bohlen,* 510 U.S. 383, 389, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994). Therefore, this Court will address these issues before considering the merits of any claim.

This Circuit has applied a three-step test to determine whether a claim is *Teague*-barred:

> (1) we determine when [Petitioner's] conviction and sentence became final, (2) we "survey the legal landscape as it then existed to determine whether a state court considering [Petitioner]'s claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution[,]" and (3) if [Petitioner] seeks the benefit of a new rule, we must decide whether the rule falls within one of the narrow exceptions to the non-retroactivity principle.

Burdine v. Johnson, 262 F.3d 336, 341 (5th Cir.2001) (quoting *Caspari,* 510 U.S. at 390), *cert. denied, Cockrell v. Burdine,* 535 U.S. 1120, 122 S.Ct. 2345, 153 L.Ed.2d 173 (2002). The Supreme Court has recognized two exceptions to this principle. The first is for new rules that place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. *See Teague,* 489 U.S. at 307; *Caspari,* 510 U.S. at 396. The second is for watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Saffle v. Parks,* 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); *Caspari,* 510 U.S. at 396. The Fifth Circuit Court of Appeals has "held that unless the Supreme Court has clearly established that the new rule falls within one of

the exceptions to the non-retroactivity principle of *Teague,* . . . that new rule could not be considered with regard to petitions governed by the AEDPA." *Cockerham v. Cain,* 283 F.3d 657, 660 (5th Cir.2002) (citations omitted).

In his second claim, Petitioner contends that due process requires the consideration of newly discovered evidence that he did not actually cause the death of the victim. He asserts that this new evidence proves that Nystrom actually stabbed the victim, causing his death. Respondent asserts that Petitioner's argument would extend the protections of the Due Process Clause beyond the perimeters drawn by the Supreme Court, and is, therefore, *Teague*-barred. This Court agrees.

Petitioner incorrectly relies upon *Herrera v. Collins,* 506 U.S. 390, 400, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). In *Herrera,* the Supreme Court stated that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." Petitioner contends that newly discovered evidence he presents in his petition challenges the validity of the jury's answers to the special issues. This claim is unsupported by existing federal law, and does not come within any exception established by the Supreme Court. Therefore, Petitioner's second claim is barred by the non-retroactivity doctrine.

In his seventh claim, Petitioner contends that his Sixth Amendment right to trial by jury was violated by the state statutory scheme of special issues that mislead the jury about their responsibility in making the determination to assess the death sentence. He relies upon *Caldwell v. Mississippi,* 472 U.S. 320, 328-29, 105 S.Ct. 2633, 86

L.Ed.2d 231 (1985), which states that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been lead to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." The Supreme Court found that the prosecutor's argument (urging the jury not to view itself as determining whether the defendant would die because the death sentence would be reviewed for correctness by the state supreme court) affirmatively mislead the jury about this critical jury function. However, Petitioner does not allege any affirmative statement in his case that mislead the jury in any way.[5] Instead, he relies solely on the fact that special issues were used instead of a verdict containing the option of an actual sentence of death.

The prohibitions of *Caldwell* do not extend to the sentencing procedure used in Petitioner's trial. In fact, this type of sentencing procedure has been expressly upheld by the Supreme Court. *See Jurek v. Texas,* 428 U.S. 262, 273-76, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). To now hold otherwise would require a new rule in violation of *Teague.* Accordingly, Petitioner's seventh claim is barred. The Court notes, however, that the comments made by the prosecutor during his final argument in the punishment

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[5] Although Petitioner's claim is limited to the use of special issues, the Court notes that *Caldwell* was clarified in *Dugger v. Adams,* 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989), which held that "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." 489 U.S. at 407. Therefore, even if Petitioner were to have directed this Court to any portion of the prosecutor's argument to the jury, that argument would not have violated *Caldwell* unless it was also inconsistent with Texas law.

phase of the trial compounded the error of not giving a mitigating instruction. The prosecutor told the jury that, "Contrary to what Mr. Daffern would have you believe, I don't have the power to say whether he lives or dies. You don't have the power to say whether he lives or dies. You answer the questions according to the evidence, mu[ch] like you did at the guilt or innocence. That's all. It's not a matter of life and death. It's whether it was deliberate. Was this act deliberate? Will he continue to commit violent acts? That's all you answer. And every one of you people told me you would base that not upon the result, but upon what the evidence dictates you must do." This line of argument was a major theme in the prosecution's closing. Although this argument does not rise to the level of *Caldwell* error, the jury was led to believe that it could not consider in mitigation evidence presented at trial.

B. Claims Not Cognizable

In his amended petition, Petitioner adds two new complaints against the federal habeas corpus process. In his eighth and ninth claims, Petitioner complains of rulings of the United States Magistrate Judge regarding the appointment of counsel, experts, and investigators, and regarding the prohibition against adding new claims in his amended petition. The Court previously addressed these claims when Petitioner appealed the rulings of the Magistrate Judge to this Court. After denial of Petitioner's appeal, Petitioner appealed this Court's order denying the appeal to the Fifth Circuit. On January 10, 2003, this Court denied a certificate of appealability, and the Fifth Circuit dismissed Petitioner's appeal for want of jurisdiction on February 5, 2003. *Brewer v. Cockrell,* No. 02-11310 (5th Cir.) (unpublished). It is unnecessary to further

review these new claims as part of Petitioner's habeas corpus petition because they are not cognizable on federal habeas corpus review.

This court may "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). To the extent Petitioner is presenting his claims against the federal habeas corpus proceeding as independent claims for relief, they constitute attacks on proceedings collateral to the detention and not the detention itself. *See Millard v. Lynaugh,* 810 F.2d 1403, 1410 (5th Cir.), *cert. denied,* 484 U.S. 838, 108 S.Ct. 122, 98 L.Ed.2d 81 (1987). Accordingly, Petitioner's eighth and ninth claims for relief are denied as not cognizable grounds for relief in this proceeding.

Although Petitioner's eighth and ninth claims are denied as not cognizable, the Court notes that they are without merit as well. Petitioner has improperly characterized a denial of funds for further investigative or expert assistance on federal habeas review as a violation of a constitutional right. *See Barraza v. Cockrell,* 330 F.3d 349, 352 (5th Cir.2003) (the statutory requirement for habeas counsel does not create a constitutionally-secured right), *cert. denied,* 540 U.S. 951, 124 S.Ct. 389, 157 L.Ed.2d 283 (2003). The Court also notes that Petitioner has not shown that the development of such new evidence would not be barred. *See Riley v. Dretke,* 362 F.3d 302, 307-08 (5th Cir.2004) (petitioner cannot show entitlement to investigate claim which is procedurally barred from review). Therefore, this Court correctly refused to fund an investigation not shown to be reasonably necessary. *See* 21 U.S.C. § 848(q)(4)(9).

With respect to Petitioner's complaint regarding adding new claims to his amended petition, Petitioner has shown no prejudice. Each of Petitioner's new claims would have been barred because they were unexhausted at the state level. 28 U.S.C. § 2254(b)(1)(A); *Martinez v. Johnson,* 255 F.3d 229, 238-39 (5th Cir.2001). Petitioner has also failed to show good cause for this failure, a requirement to overcome the procedural bar. *Id.*

Although there was some delay in appointing co-counsel on this case, Petitioner fails to demonstrate that this delay resulted in any prejudice.[6] The Magistrate Judge granted numerous deadline extensions and Petitioner was afforded the opportunity to amend his petition after co-counsel had ample time to review the case.

C. Ineffective Assistance of Counsel

In his first and fifth claims for relief, Petitioner contends that his right to the effective assistance of counsel was violated (1) by the failure of his trial counsel to seek and utilize available expert psychiatric/psychological assistance in developing mitigating evidence for the punishment phase of his trial, and (2) by the failure

[6] Petitioner's original counsel on his federal habeas petition was Mr. Rick Keffler. Mr. Keffler served as Petitioner's attorney at the state habeas level and filed a so-called "skeletal" habeas petition in this Court. That original petition mimicked the petition filed at the state habeas level, thus including all claims that were exhausted. Although Mr. Keffler complained of his inexperience and lack of knowledge with federal habeas proceedings, U.S. Magistrate Judge Clinton Averitte found good cause to appoint Mr. Keffler to this case. There is no indication that Mr. Keffler was not competent or that he has handled the proceedings in this Court in any way that would be prejudicial to his client.

of his appellate counsel to raise as error on appeal the prosecutor's comment during final argument regarding Petitioner's lack of remorse. These claims are denied.

The Sixth Amendment guarantees a defendant the right to the effective assistance of counsel. The two-pronged standard by which a claim of ineffective assistance of counsel is measured is set forth in *Strickland v. Washington,* 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The first prong of *Strickland* requires the defendant to show that counsel's performance was deficient. *Strickland,* 466 U.S. at 698. To prove deficiency, a defendant "must show that counsel's performance fell below an objective standard of reasonableness." *Id.* at 687-88. This requires a showing that the errors made by his counsel were so serious that his counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* at 687. This Court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance or sound trial strategy. *Id.* at 668, 688-89. Judicial scrutiny of counsel's performance must be highly deferential and every effort must be made to eliminate the distorting effects of hindsight. *Id.* at 689.

The second prong of this test requires the defendant to show prejudice by demonstrating that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The court need not address both prongs of the *Strickland* standard if the complainant has made an insufficient showing on one. *Id.* at 697.

In his first claim for relief, Petitioner alleges that his trial counsel was ineffective in the investigation and presentation of mitigating evidence in the punishment phase of his trial. The Supreme Court recently discussed the standard for evaluating this claim. In *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), the Court held that a "borderline" mentally-retarded habeas petitioner was denied his Sixth Amendment right to counsel when his attorney failed to investigate the petitioner's background and present mitigating evidence of his unfortunate life history at his capital murder trial. Petitioner has not identified any such evidence that was neglected in his case.

Although Petitioner contends that his trial counsel failed to investigate and present mitigating evidence, his petition makes no mention of any facts in Petitioner's life history that were not presented during his trial. Instead, he appears to rely entirely upon the fact that trial counsel did not present an expert psychological evaluation of Petitioner as mitigation evidence. This is not sufficient to show ineffective assistance. The principal concern in deciding whether Petitioner's trial counsel exercised reasonable professional judgment is not whether counsel should have presented a mitigation case. *See Wiggins,* 539 U.S. at ___, 123 S.Ct. at 2536. Instead, the focus of the inquiry is whether the investigation supporting counsel's decision not to introduce the potentially mitigating evidence of Petitioner's background was itself reasonable. *Id.*

The information available to trial counsel was sufficient to make a reasoned professional judgment in this matter. Although not mental health professionals, trial counsel had access to records of Petitioner's recent commitment and the mental health professionals who had

recently evaluated and treated him. Further, trial counsel's own observations of Petitioner did not indicate that there was anything to be gained from another evaluation. Also, trial counsel did obtain and present expert psychological testimony during the punishment phase of Petitioner's trial. A careful review of the affidavit of the psychiatrist attached to his petition reveals that any truly significant facts underlying the psychiatric opinions presented therein had already been presented in Petitioner's trial.

Petitioner's current psychiatrist identifies historical facts along with his own psychological testing in support of his evaluation and opinions. This testing was described as "problematic" and revealed malingering. These factors, along with the intervening years on death row, tended to undermine the reliability of these test results concerning Petitioner's state of mind before the offense or trial. In the opinion of this psychiatrist, Petitioner suffered from moderate attention deficit hyperactivity disorder, moderate polysubstance dependence, anxiety, major depression, and dysthymia during the time period of the offense and trial. These diagnoses had already been reflected in Petitioner's mental health records from Big Spring State Hospital, which were available and apparently known to Petitioner's trial counsel.

The strategy of Petitioner's attorneys regarding this matter was clear from the record: They did not want to give the state any excuse to evaluate Petitioner in order to prove his future dangerousness. What the prosecution lacked in evidence of a violent criminal history, Petitioner's trial counsel did not want to provide in expert psychiatric evaluation. On habeas review, the state trial court found that an expert evaluation could be "a double

edged sword" in that negative information about Petitioner could be exposed and exploited by the prosecution. This Court must review the trial strategy of Petitioner's trial counsel with deference, particularly due to the double-edged nature of pursuing expert evaluations. *See Burger v. Kemp,* 483 U.S. 776, 789-94, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (uninvestigated evidence not uniformly helpful because it suggested violent tendencies at odds with the defense strategy); *Darden v. Wainwright,* 477 U.S. 168, 184-86, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (any attempt to portray petitioner as nonviolent would have opened the door to potentially damaging prosecution evidence).

Trial counsel was not facing an idle danger. The prosecution clearly sought to use psychiatric evidence against Petitioner. The prosecutors concluded their entire punishment case with expert psychiatric testimony, trying to use that evidence to carry their burden of proving that Petitioner was a future danger. In this, they were apparently hampered by their inability to have their expert examine Petitioner due to defense counsel's strategy to avoid developing such evidence. As a result, the prosecution's expert testimony was vulnerable to defense counsel's final argument that the prosecution's expert psychiatrist lacked critical information and did not even examine the defendant before testifying to his opinions. This shows the wisdom of trial counsel's strategy, even if it was not entirely successful.

Trial counsel's strategy was supported by a reasonable investigation. Petitioner concurred with trial counsel's advice that developing expert psychological or psychiatric evidence would not be in his best interest. The state habeas court found that Petitioner's trial counsel made a

reasoned, professional judgment to not develop expert psychiatric or psychological punishment evidence. This finding has not been shown incorrect by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

In his fifth claim for relief, Petitioner complains of appellate counsel's decision not to raise as error on appeal the prosecutor's comment on Petitioner's lack of remorse as a comment on his failure to testify at the punishment phase of the trial. Appellate counsel's performance on appeal is judged under the same two-pronged standard set forth above in *Strickland v. Washington*. *See* 466 U.S. at 698; *Smith v. Robbins,* 528 U.S. 259, 286, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); *Briseno v. Cockrell,* 274 F.3d 204, 207 (5th Cir.2001).

Petitioner's claim does not satisfy either prong of *Strickland*. The prosecutor's argument did not violate Petitioner's rights under the Fifth Amendment. As set out more fully in Section E below, this argument does not appear intended or understood as a comment on his failure to testify, but upon his actions and comments before the trial and his demeanor displayed to the jury during the trial. *See Jackson v. Johnson,* 194 F.3d 641, 652 (5th Cir.1999). Further, there was no objection made at the time to this argument. The decision to not raise such a claim on appeal did not constitute deficient representation under the United States Constitution.[7]

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[7] Although Petitioner appears to rely entirely upon his appellate counsel's failure to raise the alleged constitutional violation, Petitioner also cites *Dickenson v. State,* 685 S.W.2d 320, 322-23 (Tex.Crim.App.1984), which holds that certain prosecutorial arguments can violate a state statute: Art. 38.22 of the Texas Code of Criminal Procedure. Without considering Respondent's contention that this claim is waived, this

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None of the allegations of ineffective assistance of counsel are sufficient to establish a right to habeas corpus relief. Accordingly, Petitioner's first and fifth claims for relief are denied.

D. Exculpatory Information

In his third claim for relief, Petitioner contends that the prosecution withheld exculpatory evidence from him in violation of the Fifth and Fourteenth Amendments. Specifically, Petitioner complains of the failure to disclose information concerning a prior statement of Skee Callen and concerning the background and credibility of the state's pathologist.

The "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct.

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state-law matter has been determined by the state courts not to have been violated.

Federal courts in post-conviction habeas corpus proceedings do not sit to review questions of state law. *See Engle v. Isaac,* 456 U.S. 107, 119-21, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *see also Johnson v. Cain,* 215 F.3d 489, 494 (5th Cir.2000) (referring to "the longstanding principle that federal courts do not sit to review questions of state law."); *Dickerson v. Guste,* 932 F.2d 1142, 1145 (5th Cir.1991) ("We will not review a state court's interpretation of its own law in a federal habeas corpus proceeding"), *cert. denied,* 502 U.S. 875, 112 S.Ct. 214, 116 L.Ed.2d 172 (1991). Even if Petitioner means to contend that his attorney failed to complain of a violation of state law, the state court determined that no such state-law violation occurred. Therefore, the attorney's conduct was not considered deficient regarding this state-law matter, and this Court should not conclude otherwise in order to find any deficient representation in this proceeding.

1194, 10 L.Ed.2d 215 (1963). The three components or essential elements of a *Brady* prosecutorial misconduct claim are (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, (2) the evidence must have been suppressed by the State, either willfully or inadvertently, and (3) prejudice must have ensued. *See Banks v. Dretke,* 540 U.S. 668, 124 S.Ct. 1256, 1272, 157 L.Ed.2d 1166 (2004); *Strickler v. Greene,* 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

In the instant case, the record of the trial reflects that the prior statement of Skee Callen was provided to defense counsel. In fact, the precise matter raised in this petition was made the basis of trial counsel's cross examination of this witness. Further, regarding the testimony of the pathologist, Petitioner raises questions concerning the qualifications of this expert and truthfulness of his testimony in other cases. Petitioner produced correspondence from another expert that expresses opinions contrary to those expressed by the pathologist who testified at the trial. However, Petitioner has not shown that any of this information was in the possession of the prosecution at or before his trial, or that prejudice ensued from any nondisclosure. Therefore, Petitioner's allegations fail to establish a prima facie case. Petitioner's third claim for relief is denied.

E. Prosecutor's Argument

In Petitioner's fourth claim, he alleges that his right to remain silent, as guaranteed by the First and Fourteenth Amendments, was denied by the prosecutor's argument that Petitioner showed no remorse. Respondent

argues that this statement summarized evidence before the jury showing lack of remorse along with Petitioner's emotionless demeanor displayed during the trial.

> "For there to have been a denial of one's fifth amendment right to remain silent, the prosecutor's manifest intent in making the remark must have been to comment on the defendant's silence, or the character of the remark must have been such that the jury would naturally and necessarily construe it as a comment on the defendant's silence. To expound on the first inquiry, the prosecutors intent is not manifestly impermissible if there is some other, equally plausible explanation for the remark. For the second inquiry, the question is not whether the jury might or probably would view the challenged remark in this manner, but whether it necessarily would have done so."

Jackson v. Johnson, 194 F.3d 641, 652 (5th Cir.1999) (citations omitted).

In *Jackson,* the prosecutor's comment, "Look at him, he hasn't shown any remorse," during final argument, made in the context of the defendant's conduct immediately after the incident, was not considered a comment on the defendant's failure to testify. *See also Moore v. State,* 849 S.W.2d 350, 352 (Tex.Crim.App.1993) ("when there is evidence in the record indicating a lack of remorse, a comment upon the defendant's lack of remorse does not naturally and necessarily lead the jury to understand it to be a comment upon the defendant's failure to testify.").

Similarly, the Fourth Circuit Court of Appeals concluded that an argument similar to that made in the instant case did not constitute a violation of the defendant's

Fifth Amendment right to remain silent at sentencing. *Bates v. Lee,* 308 F.3d 411, 421 (4th Cir.2002), *cert. denied,* 538 U.S. 1061, 123 S.Ct. 2223, 155 L.Ed.2d 1113 (2003). The Fourth Circuit had previously "found that prosecutorial comments about the lack of remorse demonstrated by a defendant's demeanor during trial do not violate a defendant's Fifth Amendment right not to testify." *Id.; see also Howard v. Moore,* 131 F.3d 399, 421 (4th Cir.1997); *Gaskins v. McKellar,* 916 F.2d 941, 951 (4th Cir.1990). Distinguishing comments regarding what a defendant failed to say from those regarding the defendant's demeanor during trial, the court concluded that the defendant in that case "was not, of course, obligated to show remorse for his murder of Jenkins either before or during trial. However, the absence of any indication of contrition on his part for the taking of another human life was not beyond the range of prosecutorial comment during sentencing." *Bates,* 308 F.3d at 421-22; *see also Borodine v. Douzanis,* 592 F.2d 1202, 1210-11 (1st Cir.1979) (holding argument that defendant never had a "shred of remorse from the beginning right up until now" was probably intended and understood as a reflection on the defendant's expressionless courtroom demeanor rather than on his right not to take the stand).

The state court on habeas review found that these comments referred to Petitioner's expressions to others and his impassive mien in court, signifying a cavalier attitude about the offense. Petitioner has not shown that these findings are incorrect. Accordingly, Petitioner's fourth claim for relief is denied.

F. Cumulative Error

In his tenth and final claim, Petitioner alleges that the cumulative effect of violations noted in his preceding claims constitutes an independent violation of the Constitution. Although the Court has found a constitutional violation for failure to instruct the jury on mitigating evidence, the Court has also found Petitioner's other allegations meritless or improperly before the Court. Accordingly, there is nothing to cumulate in support of federal habeas corpus relief. *See Yohey v. Collins,* 985 F.2d 222, 229 (5th Cir.1993). Therefore, Petitioner's tenth claim for relief is denied.

V.

CONCLUSION

For each of the reasons set out above, Petitioner's sixth claim for relief is granted and each of the other claims for relief is denied. A writ of habeas corpus shall issue to the Respondent, vacating Petitioner's sentence and commuting it to life, unless, within 180 days from the entry of the judgment in this matter, the State of Texas grants Petitioner a new sentencing hearing or commutes his sentence to life. Judgment will be entered accordingly.

It is SO ORDERED.

442 F.3d 273

United States Court of Appeals, Fifth Circuit.

Brent Ray BREWER, Petitioner-Appellee,

v.

Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellant.

No. 04-70034.

March 1, 2006.

Michael Dennis Samonek, Denton, TX, for Brewer.

Edward Larry Marshall, Austin, TX, for Dretke.

Appeal from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING

Before JOLLY, SMITH and GARZA, Circuit Judges.

PER CURIAM:

The petition for panel rehearing is DENIED. The prior opinion, *Brewer v. Dretke,* 410 F.3d 773 (5th Cir.2005), is WITHDRAWN, and the following opinion is substituted:

Before JOLLY, SMITH and GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The district court conditionally granted, pursuant to 28 U.S.C. § 2254, death row inmate Brent Brewer's petition for writ of habeas corpus, holding that the special issues submitted during his punishment phase were a constitutionally inadequate vehicle for the jury to give effect to his mitigating evidence. The state appeals on the grounds that the court failed (1) properly to assess the

reasonableness of the state court's adjudication as required by 28 U.S.C. § 2254(d) and (2) correctly to apply valid Supreme Court and Fifth Circuit precedent. We reverse and render judgment denying the habeas petition.

I.

Brewer was sentenced to death for a murder committed during a robbery. At trial, he introduced a variety of mitigating evidence, including the following facts: that he had a bout with depression three months before the murder; that he was briefly hospitalized for that depression;[1] that his co-defendant, a woman with whom he was apparently obsessed, dominated and manipulated him;[2] that he had been abused by his father;[3] that he had

---

[1] The state's brief reveals that Brewer's mental illness claim is not based on an especially strong factual predicate:

> Brewer was not adjudged mentally retarded, however he was involuntarily committed on January 1, 1990 for "major depression, *single episode, without psychotic features,* poly-substance abuse." The examining physician based his opinion on a *suicide note [Brewer] wrote to his mother.* On January 25, [Brewer] signed a request for *voluntary admission to* Big Springs [*sic*] State Hospital for fourteen days.

(Emphasis added.) These facts differ dramatically from those in *Bigby v. Dretke,* 402 F.3d 551, 571 (5th Cir.), *cert. denied,* ___ U.S. ___, 126 S.Ct. 239, 163 L.Ed.2d 221 (2005), in which the petitioner's "evidence indicated that his schizophrenia was chronic and severe, caused him to suffer delusions with respect to the actions and motivations of the people around him, could not be adequately treated, and significantly impacted his interpersonal relationship abilities."

[2] This evidence was not medical and did not go to Brewer's volition; it consists merely of lay observations that the woman was the alpha partner in the relationship.

[3] There was no evidence that Brewer's child abuse in any way impaired his cognitive abilities.

witnessed his father abuse his mother; and that he had abused drugs.[4] Brewer did not secure expert psychological or psychiatric evidence because of a decision, made in consultation with his attorney, that such material would not be in his best interest. Brewer submitted at least seven proposed instructions designed to give effect to the mitigating evidence that he did present, but the trial court denied all of those instructions and, instead, required only that the jury answer two special questions relating to deliberateness and potential for future dangerousness.

The conviction was affirmed on direct appeal,[5] after which Brewer initiated what were ultimately unsuccessful state habeas proceedings.[6] He then filed the instant federal habeas petition. After requesting supplemental briefing concerning *Tennard v. Dretke*, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), the district court, as we have said, granted conditional relief.

II.

A.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), at 28 U.S.C. § 2254(d), sets forth the conditions under which a court shall grant a petition for a writ of habeas corpus:

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[4] This evidence apparently consisted of Brewer's use of marihuana as a teenager.

[5] *Brewer v. State*, No. 71,307 (Tex.Crim.App.1994) (unpublished), *cert. denied*, 514 U.S. 1020, 115 S.Ct. 1367, 131 L.Ed.2d 223 (1995).

[6] *Ex parte Brewer*, No. 46,587-01 (Tex.Crim.App.2001) (unpublished).

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 2254(d)(1) addresses pure questions of law and mixed questions of law and fact. *See Martin v. Cain,* 246 F.3d 471, 475 (5th Cir.2001). Under the first ("contrary to") clause, a federal district court may grant habeas relief if the state court decided a case differently from how the United States Supreme Court decided a case on a set of materially indistinguishable facts. *Williams v. Taylor,* 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under the second ("unreasonable application") clause, a court may grant habeas relief if the state court correctly divined a legal principle from the Supreme Court's jurisprudence but misapplied that principle to the facts. *See id.*

Section 2254(d)(2) addresses pure questions of fact. *See Moore v. Johnson,* 225 F.3d 495, 501, 504 (5th Cir.2000). Under this subsection, federal courts must give deference to state court findings of fact unless they are

based on an unreasonable interpretation of the evidence presented in the state court proceeding.[7]

B.

We review the federal district court's findings of fact for clear error and its conclusions of law *de novo*. *See Martinez v. Johnson*, 255 F.3d 229, 237 (5th Cir.2001). The legal conclusion at issue is the holding that "[r]eviewing the evidence in light of the special issues, a jury would be very hard pressed to see the evidence presented as anything but aggravating. Failure to submit an instruction on mitigation evidence was an unreasonable application of federal law and Supreme Court precedent."[8] Section 2254(d)(1) therefore controls our review, and we conduct a *de novo* inquiry to determine whether the state court's decision is contrary to, or an unreasonable application of, clearly established Supreme Court precedent.[9] We do so here by analyzing *de novo* the federal district court's decision to see whether it properly decided that the state court did not satisfy § 2254(d)(1).

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[7] *See Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir.2000) (as modified on denial of rehearing). Factual determinations made by the state court are presumptively correct and will not be disturbed unless the petitioner rebuts the presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

[8] As we will discuss momentarily, this language – stating that the mitigating evidence was capable of nothing but an aggravating interpretation – seems somewhat at odds with language earlier in the opinion stating that "the evidence at Petitioner's trial does not fit squarely [in the dangerousness instruction] either. One could view the evidence as either aggravating or mitigating."

[9] The district court rejected seven additional habeas claims that Brewer included in his petition. Brewer does not cross-appeal these rulings.

III.

The trial court instructed the jury, pursuant to article 37.071 of the Texas Code of Criminal Procedure (Vernon 1991), as follows:

> Special issue No. 1
>
> Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, BRENT RAY BREWER, that caused the death of the deceased, Robert Doyle Laminack, was committed deliberately and with the reasonable expectation that the death of the deceased would result?
>
> Special issue No. 2
>
> Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, BRENT RAY BREWER, would commit criminal acts of violence that would constitute a continuing threat to society?

A.

We consider it appropriate to devote significant space to discussing the jurisprudence associated with article 37.071. In *Jurek v. Texas,* 428 U.S. 262, 272, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Court upheld the Texas statutory special issues approach in the punishment phase of capital trials, but did so on the explicit premise that the special issues were capable of an expansive construction to capture proper mitigation evidence. In *Franklin v. Lynaugh,* 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), the Court made plain that, at least with respect to some mitigation evidence, deviating from the special

issues approach is not necessary. Specifically, it found the "dangerousness" special issue was capable of capturing evidence of the petitioner's good behavior while incarcerated.

In *Penry v. Lynaugh,* 492 U.S. 302, 322, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) ("*Penry I*"), the Court held that the two special issues were not sufficient to give mitigating effect to Penry's evidence of mental retardation and a history of abuse. It stated that each of those factors represents " 'a two-edged sword': [Each] may diminish [the petitioner's] blameworthiness for his crime even as it indicates there is a probability that he will be dangerous in the future." *Id.* at 324, 109 S.Ct. 2934.

Four years after *Penry I,* the Court decided *Johnson v. Texas,* 509 U.S. 350, 367-68, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993), in which the defendant invoked *Penry I* in an attempt to invalidate his death sentence – a sentence imposed despite his evidence of youth. *See id.* at 368, 113 S.Ct. 2658. The future dangerousness issue alone, the Court concluded, gave the jurors a constitutionally sufficient vehicle for considering Johnson's youth in making its reasoned moral response.[10] "It strains credulity to suppose that the jury would have viewed the evidence of petitioner's youth as outside its effective reach in answering the second special issue." *Id.*

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[10] *Johnson,* 509 U.S. at 368, 113 S.Ct. 2658 ("The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside. We believe that there is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination.").

After *Johnson,* therefore, it was indisputable that *Jurek* remained good law and that, although some relevant evidence may receive constitutionally insufficient mitigating effect under the standard Texas special issues (*e.g.,* evidence of mental retardation), other evidence is quite capable of being given mitigating effect through that methodology. When mitigating evidence falls into that latter category, the imposition of the death penalty under the pre-*Penry I* scheme does not offend the Eighth Amendment.

In following *Penry I,* this court developed a two-part test for determining whether the defendant's evidence requires a special mitigation instruction: (1) whether the proffered material was constitutionally relevant mitigating evidence and (2) whether the proffered evidence was beyond the effective reach of the jurors.[11] We in turn defined "constitutionally relevant" evidence as that which was "due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own . . . ."[12] In *Tennard,* however, the Supreme Court flatly rejected that test of constitutional relevance and instructed us instead that the definition of relevance in this context is no different from the definition of relevance in most others: "any tendency to make the existence of any fact that is of consequence to the determination of

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[11] *Smith v. Cockrell,* 311 F.3d 661, 680 (5th Cir.2002) (internal citations and quotations omitted).

[12] *Graham v. Collins,* 950 F.2d 1009, 1029 (5th Cir.1992) (en banc), *aff'd,* 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993).

the action more probable or less probable than it would be without the evidence . . . ."[13]

B.

For the mitigating evidence to be within the effective reach of the jury in answering the special issues, the special interrogatories must be capable of giving relevant evidence constitutionally sufficient mitigating effect. Whether that sufficiency requires that the evidence be given "full," or merely "some," mitigating effect has been the subject of considerable discussion in this court,[14] but ultimately the distinction is only one of semantics, because regardless of what label is put on the word "effect," it is indisputable that the effect must be constitutionally "sufficient." Even if the requirement is called "full," it means nothing more than "sufficient." We now turn to the district court's application of this standard for the purpose of deciding, under the facts and circumstances of this case, whether the special interrogatories allowed the jury to give such sufficient mitigating effect to the evidence in question.

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[13] *Tennard*, 542 U.S. at 283, 124 S.Ct. 2562 (internal citations and quotations omitted.). *Tennard* further clarified that impaired intellectual functioning is inherently mitigating (and therefore must be capable of being given mitigating effect through the special jury instructions) and is subject to the same legal analysis as is mental retardation for purposes of a *Penry I* claim. *See id.* at 287, 124 S.Ct. 2562.

[14] *Compare Coble v. Dretke*, 417 F.3d 508, 527 (5th Cir.2005) *with Cole v. Dretke*, 418 F.3d 494, 496-511 (5th Cir.2005).

C.

To determine whether a jury has sufficient vehicles for considering mitigating evidence, the habeas court must determine whether "there is no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of the [mitigating evidence]." *Johnson,* 509 U.S. at 368, 113 S.Ct. 2658. We conduct a *de novo* inquiry into whether the district court applied this standard properly, and we conclude that it did not.

As we noted earlier, at trial Brewer introduced a variety of mitigating evidence, including the following facts: that he had a bout with depression three months before the murder; that he was briefly hospitalized for that depression; that his co-defendant, a woman with whom he was apparently obsessed, dominated and manipulated him; that he had been abused by his father; that he had witnessed his father abuse his mother; and that he had abused drugs.[15] Apparently the district court seriously considered only the mental illness and drug abuse as potentially warranting habeas relief.[16] Brewer offered

[15] For further explanation of each of set of proffered evidence, *see* notes 1-4, *supra.*

[16] There is considerable authority that evidence of a troubled childhood falls within the scope of the special issues. *See Graham,* 506 U.S. at 475, 113 S.Ct. 892; *Jacobs v. Scott,* 31 F.3d 1319, 1327 (5th Cir.1994). Comparison of *Graham* and *Penry I* reveals a constitutional distinction between, on the one hand, "severe" abuse of the type Penry sustained and, on the other, a "mere" troubled childhood of the sort Graham experienced. In *Graham* the Court seems to sanction such a side-by-side comparison as a permissible way of conducting the inquiry. *See Graham,* 506 U.S. at 476, 113 S.Ct. 892.

There is no easy way to locate Brewer at either pole. First, the trial evidence indicates that Brewer's father hit Brewer "numerous" times but, because of the timing of the father's reintroduction into the family,

(Continued on following page)

evidence of one hospitalization for a single episode of non-psychotic major depression that was at least partially a result of a suicide note he had written to his mother.

This circuit has made a distinction between mental retardation and mental illness.[17] A mental illness inquiry does not require any adjustment to the standard two-pronged interrogatory, and we have rejected habeas petitions on these grounds on other occasions.[18] The only

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this abuse could not have occurred until Brewer was at least fifteen (Penry was subject to abuse beginning at a very young age.). Although the abuse was more than an isolated incident, it does not rise to the level of that at issue in *Penry*. *See Penry I*, 492 U.S. at 309, 109 S.Ct. 2934. Moreover, as noted earlier, Brewer and his attorney made an informed decision not to present expert psychiatric testimony.

Second, *Penry I* considers the mitigation issue in light of Penry's mental retardation and child abuse, *evaluated as a single unit*. *See also Cole*, 418 F.3d at 502 (alluding to the mitigating evidence as that of Cole's "destructive family background *and* organic neurological deficiency") (emphasis added). The vast majority of subsequent caselaw has addressed mental retardation in isolation. It is thus doubtful that Brewer's child abuse, without additional evidence of cognitive limitation, had mitigating effects sufficiently beyond the jury's reach to constitute a violation of the Eighth Amendment.

For the remaining issues (other than mental illness, substance abuse, and troubled childhood), it was at least reasonably likely that the special issue involving dangerousness did not foreclose consideration of the mitigating evidence. *See Cole, id.* at 508. To understand why the district court did not undertake a serious discussion of the other five pieces of evidence, *see* notes 1-4, *supra*.

[17] *See Robison v. Johnson*, 151 F.3d 256, 265-66 (5th Cir.1998).

[18] *See, e.g., Hernandez v. Johnson*, 248 F.3d 344, 349 (5th Cir.2001) (holding that the future dangerousness special issue was capable of giving effect to this mitigating evidence); *Lucas v. Johnson*, 132 F.3d 1069, 1082-83 (5th Cir.1998) (holding that the deliberateness special issue was capable of giving this evidence effect). These cases remain good law even after *Tennard*, because *Tennard* overturned only Fifth Circuit methodology for determining what mitigating evidence is

(Continued on following page)

instances in which mental illness has given rise to *Penry I* violations involve those where the illness in question is chronic and/or immutable. *See, e.g., Bigby* (in which petitioner suffered from chronic paranoid schizophrenia).[19] In *Graham* the Court stated:

> [W]e are not convinced that *Penry* could be extended to cover the sorts of mitigating evidence Graham suggests without a wholesale abandonment of *Jurek* and perhaps also of *Franklin v. Lynaugh* .... *Jurek* is reasonably read as holding that the circumstance of youth is given constitutionally adequate consideration in deciding the special issue. We see no reason to regard the circumstances of Graham's *family background* and positive character traits in a different light. Graham's evidence of transient upbringing and otherwise nonviolent character more closely

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constitutionally relevant. *See Tennard,* 542 U.S. at 285-87, 124 S.Ct. 2562.

[19] The *Bigby* court decided that the second special issue (future dangerousness) was incapable of acting as an exculpatory vehicle for this evidence:

> Furthermore, although this Circuit has previously held that mitigation evidence of mental illness could be considered within the context of the second special issue, future dangerousness, if the illness can be controlled or go into remission, *see e.g., Lucas [v. Johnson],* 132 F.3d 1069; *see also Hernandez v. Johnson,* 248 F.3d 344 (5th Cir.2001), Bigby's mitigation evidence indicated that his condition cannot be adequately controlled or treated .... In short, Bigby's evidence that his mental disorders made it difficult for him to avoid criminal behavior has the same "double-edged sword" quality as Penry's evidence that he was unable to conform his conduct to the law.

Bigby, 402 F.3d at 571.

> resembles Jurek's evidence ... than it does Penry's ....

Graham, 506 U.S. at 476, 113 S.Ct. 892 (emphasis added).

More recently, this court in *Cole* has explained why evidence of a troubled childhood may, as a result of its temporary character, fall sufficiently within the ambit of the special dangerousness instruction: "Given the experts' testimony during the punishment phase, the jury could have believed them and found that, although Cole suffered a turbulent childhood and may suffer from diminished impulse control, he is capable of change and thus would not necessarily remain a danger in the future." *Cole,* 418 F.3d at 507. In *Coble,* a panel of this court made an analysis that is consistent with *Cole* on this point of law: "This Circuit has previously held that mitigating evidence of mental illness could be considered within the context of the second special issue, future dangerousness, if the illness can be controlled or go into remission."[20]

Although *Graham* and *Jacobs* provide sufficient authority for our determination that the special issues are here capable of giving Brewer's evidence of a troubled childhood constitutionally mitigating effect, our court's more recent opinions in *Cole* and *Coble* bolster that proposition considerably. Cole presented evidence of destructive family background and of organic neurological defects that arguably amounted to a lack of impulse control.[21] The *Cole*

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[20] *Coble,* 417 F.3d at 523 (citing *Lucas v. Johnson,* 132 F.3d 1069, 1082-83 (5th Cir.1998); *Robison v. Johnson,* 151 F.3d 256, 266 (5th Cir.1998)).

[21] In *Cole,* the state presented the following mitigating evidence: (1) Cole's mother was an alcoholic unable to care for her children; (2) Cole's father was arrested for robbery; (3) Cole's father deserted the family

(Continued on following page)

court relied on *Graham*'s holding that "family background evidence falls within the broad scope of Texas's special issues."[22]

In *Coble* and *Cole,* moreover, the record contained expert psychiatric evidence that bore both on the defendants' future dangerousness and other potential issues relating to mental impairment.[23] Even if Brewer had proved mental illness (which it appears he did not), and even if mental illness were tantamount to mental retardation for the purposes of our case law (which it is not), Brewer came nowhere near to producing evidence sufficient for us to grant relief.

Cole offers the following summary of the caselaw:

> As the expert testimony intimated that Penry was unable to learn from his mistakes, the *Johnson* court concluded that the only logical manner in which Penry's jury could have considered the evidence of his mental retardation under the future dangerousness special issue was as an aggravating factor: Penry would remain a danger in the future because there was no chance that he would ever understand that rape and murder

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when Cole was five years old; (4) Cole's mother moved with her children to her parent's home; (5) Cole's grandparents were alcoholics who did not want the children; (6) Cole was isolated from other children because his grandparents' home was eight miles out of town; (7) Cole had difficulty getting to school; (8) Cole was placed in a children's home at the age of five; (9) while there, his mother visited him only twice; (10) his father never visited him there; and (11) his uncle adopted his brother, but not him. *Cole,* 418 F.3d at 499-500.

[22] *Id.* at 507 (internal quotations omitted) (citing *Graham,* 506 U.S. at 476, 113 S.Ct. 892).

[23] *See, e.g., id.* at 505-06, 113 S.Ct. 892; *Coble,* 417 F.3d at 522-23.

> were wrong. Thus, Penry's jury was unable to give any mitigating effect to the mental retardation evidence that he proffered.

Cole, 418 F.3d at 505 (footnote omitted). The *Cole* panel went on to distinguish the evidence before it from that in *Penry I* on the ground that, because the evidence indicated that Cole's condition was capable of being cured and that he was capable of learning from his mistakes, the future dangerousness question could also give the psychiatric evidence constitutionally sufficient mitigating effect. *See id.* at 505-07.

We confront an even more extreme case here. There does not appear to be one iota of evidence suggesting either that Brewer's condition is permanent or that he experienced cognitive limitations of any sort as the result of it.

We likewise have rejected claims that mitigating evidence pertaining to substance abuse, without an adjustment to the sentencing issues, can support a *Penry* violation.[24] Generally these cases stand for the proposition that, even under the two-pronged special issue methodology, a jury can adequately incorporate evidence of short-term mental illness and substance abuse into its decision calculus.[25]

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[24] *See, e.g., Harris v. Cockrell,* 313 F.3d 238, 242 (5th Cir.2002) (holding that the "jury was able to give mitigating effect to the evidence of Harris's alcoholism through its answers to the first and second special issues"); *James v. Collins,* 987 F.2d 1116, 1121 (5th Cir.1993) (holding that voluntary intoxication can be given effect through the deliberateness prong).

[25] Moreover, we hesitate to infer any diminished capacity in moral or analytic reasoning in light of the fact that Brewer has a tested IQ of 115, placing him in roughly the ninety-fourth percentile of human intelligence.

Therefore, the district court erred in granting Brewer's petition for a writ of habeas corpus. The judgment is REVERSED, and judgment is RENDERED denying the petition.

2006 WL 1528242 (Mem)

___ S.Ct. ___, 75 USLW 3203

Supreme Court of the United States

Brent Ray **BREWER**, petitioner,

v.

Nathaniel QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division.

No. 05-11287.

Oct. 13, 2006.

Case below, *Brewer v. Dretke,* 442 F.3d 273.

Motion of petitioner for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted. The case is consolidated and a total of one hour is allotted for oral argument.

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No. 05-11287

FILED

NOV 29 2006

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

BRENT RAY BREWER,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the pre-1991 Texas capital sentencing instructions – which permitted jurors to return only a "yes" or "no" answer to two "special issues" inquiring whether a defendant had killed "deliberately" and would probably constitute a "continuing threat to society" – deprive Mr. Brewer of constitutionally adequate consideration of mitigating evidence about his mental impairment and childhood mistreatment and deprivation, in light of this Court's recognition in *Smith v. Texas*, 543 U.S. 37, 48 (2004), that those two questions "had little, if anything, to do with" Smith's evidence of mental impairment and childhood mistreatment?

2. Do this Court's opinions in *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*"), and *Smith* preclude the Fifth Circuit from adhering to its earlier decisions refusing to find error under *Penry v. Lynaugh*, 492 U.S. 302 (1989), whenever the pre-1991 special issues might have afforded some stunted consideration of a defendant's mitigating evidence?

3. Does the Fifth Circuit's insistence that a defendant's mental disorder must be severe, permanent or untreatable in order to qualify for relief under *Penry*, impermissibly resurrect the threshold test for "constitutional relevance" that this Court rejected in *Tennard v. Dretke*, 542 U.S. 274 (2004)?

4. When the prosecution repeatedly implored jurors to "follow the law" and "do their duty" by answering the former Texas special issues factually and refusing to fashion answers designed to produce an appropriate sentence, is there "a reasonable probability that the jury has applied the [special-issues] instructions in a way that prevents the consideration of constitutionally relevant evidence," *Boyde v. California*, 494 U.S. 370, 380 (1990)?

PARTIES TO THE PROCEEDINGS BELOW

The caption of the case contains the names of all parties to the proceedings in the courts below and in this Court, with the exception that during part of the prior proceedings, other individuals (Gary Johnson, Janie Cockrell, and Douglas Dretke) served as the named Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

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JURISDICTION

The Fifth Circuit entered judgment on March 1, 2006. *See* JA 214. Petitioner filed his Petition for Writ of Certiorari in this Court on May 30, 2006. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States and the pre-1991 version of the Texas capital sentencing statute. The relevant portion of the Eighth Amendment provides: "nor [shall] cruel and unusual punishments [be] inflicted." U.S. Const., amend. VIII. The relevant portion of the Fourteenth Amendment provides: " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV.

The former Texas capital sentencing statute, Texas Code of Criminal Procedure Ann., art. 37.071 (Vernon's ed. 1989), provided as follows:

. . .

b) On conclusion of the presentation of the evidence [at the separate sentencing hearing], the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted.

. . .

e) If the jury returns an affirmative finding on each issue submitted under this Article, the Court shall sentence the defendant to death. . . .

STATEMENT OF THE CASE

A. Course of proceedings

Petitioner ("Mr. Brewer") was convicted and sentenced to death in Randall County, Texas. The judgment was affirmed on appeal. *Brewer v. State*, No. 71,307 (Tex. Crim. App. 1994) (unpublished), JA 122-71, *cert. denied*, *Brewer v. Texas*, 514 U.S. 1020 (1995). He unsuccessfully sought state post-conviction relief. *Ex parte Brewer*, 50 S.W.3d 492 (Tex. Crim. App. 2001) (unpublished). *See* JA 177-84.

On federal habeas review, the District Court granted relief as to sentence. *Brewer v. Dretke*, 2004 WL 1732312 (N.D. Tex. 2004), JA 213. Respondent appealed; a Fifth Circuit panel reversed. *Brewer v. Dretke*, 410 F.3d 773 (5th Cir. 2005). Mr. Brewer sought rehearing; the panel denied rehearing but withdrew its original opinion, substituting another. *Brewer v. Dretke*, 442 F.3d 273 (5th Cir. 2006), JA 214. Mr. Brewer sought review in this Court, which was granted on October 13, 2006. *Brewer v. Quarterman*, 2006 WL 1528242 (U.S.) (Mem.), JA 230.

B. Facts material to the issues presented

Mr. Brewer was convicted and sentenced to death for murdering Robert Laminack in the course of robbery. Taken in the light most favorable to the verdict, the evidence showed that Mr. Brewer and Kristie Nystrom solicited a ride to the Salvation Army from Mr. Laminack. After they had traveled about a block in Mr. Laminack's truck, Mr. Brewer stabbed Mr. Laminack several times while Nystrom held his arm to keep him from fighting back. Nystrom was later seen with Mr. Laminack's property; a witness testified that Mr. Brewer told him he had killed a man for $140, the amount of money Mr. Laminack was believed to have had on his person. *See* JA 124.

Significant mitigating evidence was introduced at punishment, including details about Mr. Brewer's abused background and mental illness. Mr. Brewer and his mother were subjected to extensive physical abuse at the hands of Mr. Brewer's father, causing Mr. Brewer to become violent to protect his mother – a fact that the prosecution emphasized in closing argument as supporting

an affirmative answer to the "future dangerousness" special issue. JA 116-17.[1] The defense also introduced evidence establishing that Mr. Brewer suffered from depression severe enough to have required his involuntary commitment to a psychiatric hospital just three months before his offense. The District Court summarized the evidence as follows:

> At trial, witnesses testified that [Mr. Brewer] was emotionally and physically abused by his father, that he suffered severe depression, and that just three months before the murder, [Mr. Brewer] was committed to a psychiatric hospital where he fell under the influence of his co-defendant who dominated and manipulated him.
>
> [Mr. Brewer] did not know his father until he was fifteen years old. After his father, Albert, reconciled with [his] mother, Karon, Albert abused both Karon and [Mr. Brewer]. Karon testified that Albert hit [Mr. Brewer] numerous times with items such as the butt of a pistol, a flashlight, and his fists. During one episode, Albert tried to hit [Mr. Brewer] with a stick of firewood. When Albert went outside to get the firewood, Karon slammed the front door and locked it. After Albert busted the glass out of the front door with the firewood, Karon called the police and Albert was arrested.
>
> [Mr. Brewer] witnessed the physical abuse of his mother by his father. [He] would get between his parents. At one point, Albert, a Vietnam veteran who suffers from post-traumatic

---

[1] We cite the transcript of testimony from Mr. Brewer's trial as "RR" ("Reporter's Record") and the pleadings, orders, etc., of the trial court as "CR" ("Clerk's Record"). *See* Tex. R. App. Proc. 34 and notes and commentary thereto (defining "Clerk's Record" and "Reporter's Record").

> stress disorder and depression, stated, 'If your (sic) ever draw your hand back, you'd better kill me, because I'll kill you.' There followed a violent confrontation with his son that landed Albert in the hospital. In his testimony, Albert conceded that [Mr. Brewer] was only seeking to protect his mother by getting into a fight between Albert and Karon and stopping Albert's attack, which included throwing chairs at Karon. Albert acknowledged that the incident was his fault and that he needed to be stopped. He testified that [Mr. Brewer] was distraught over the injuries which he had caused his father. Despite the testimony by Albert, the prosecution used this incident in its closing argument as an example of how [Mr. Brewer] might pose a continuing threat to society.
>
> [Mr. Brewer] became severely depressed and just three months before the murder of Robert Laminack he was involuntarily committed to a psychiatric hospital after making suicide threats.

JA 187-88.

Defense counsel unsuccessfully requested a "separate proposed special issue on mitigation evidence." JA 189. As a result, the jury was instructed to answer only the "deliberateness" and "future dangerousness" special issues of the pre-1991 Texas capital sentencing scheme. Defense counsel nonetheless sought to encourage jurors to respond to Mr. Brewer's mitigating evidence by answering "no" to one of the special issues. JA 109. The prosecution fought to undermine this effort, arguing that under their instructions the jurors had no authority to render a moral judgment about whether Mr. Brewer should live or die. *See, e.g.*, JA 114 (telling jurors they do not "have the power to say whether [Mr. Brewer] lives or dies"). Instead, the prosecution insisted: "You answer the questions according

to the evidence, mu[ch] like you did at the guilt or innocence. That's all. It's not a matter of life and death." JA 114-15.

SUMMARY OF THE ARGUMENT

More than ten years ago, this Court reaffirmed in *Johnson v. Texas*, 509 U.S. 350, 369 (1993), that capital sentencing instructions must give jurors a "meaningful basis to consider the relevant mitigating qualities" of whatever mitigating factors the defendant offers. *Accord Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*"), *Smith v. Texas*, 543 U.S. 37 (2004). The Texas system under which Mr. Brewer was condemned failed to provide his jurors an opportunity to consider the relevant mitigating qualities of his abused childhood and mental impairment, in light of the sentencing instructions as they functioned in the context of his trial. Just as in *Penry v. Lynaugh*, 492 U.S. 302 (1989), the deliberateness and dangerousness special issues failed to address the relevant mitigating qualities of Mr. Brewer's abused childhood and mental impairment. Worse, and again as in *Penry*, the only common-sense inference to be drawn from Mr. Brewer's mitigating evidence was that he would likely be dangerous in the future. And the prosecution exploited the facial narrowness of the special issues by insisting that jurors focus solely on whether Mr. Brewer was dangerous or would pose a dangerous threat in the future, rather than considering what potentially mitigating factors might account for or explain his dangerousness.

The District Court, in an opinion issued just six weeks after this Court announced *Tennard v. Dretke*, 542 U.S. 274 (2004), correctly found that under *Tennard* the state court's treatment of Mr. Brewer's *Penry* claim was objectively unreasonable and thus subject to correction under 28 U.S.C. §2254(d). *See* JA 192-96. On the warden's

appeal, however, the Fifth Circuit overrode the District Court's straightforward application of *Tennard*, invoking a set of categorical rules of the very sort that *Tennard* had held unacceptable. The Fifth Circuit found a "constitutional distinction" between being physically abused as a young child (like Penry) and suffering such mistreatment as an adolescent (like Mr. Brewer). JA 223 n.16. Given this "constitutional distinction," the Fifth Circuit regarded the abuse Mr. Brewer endured as insufficiently severe to implicate *Penry*. JA 224. ("Although the abuse was more than an isolated incident, it does not rise to the level of that at issue in *Penry*"). Respecting Mr. Brewer's mental impairment, the Fifth Circuit invoked yet another categorical rule: "This circuit has made a distinction between mental retardation and mental illness. . . ." JA 224. Evidence of mental illness, it held, requires no additional jury instructions unless "the illness in question is chronic and/or immutable." JA 225. Mr. Brewer's "single episode of non-psychotic major depression" failed the "chronic and/or immutable" test, making *Penry* relief unavailable. JA 228. None of these rationales can be squared with *Tennard* or with *Penry* itself.

The decision of the Texas Court of Criminal Appeals ("CCA") earlier in the case was equally at odds with this Court's precedents and thus an objectively unreasonable application of the Court's clearly established Federal law. The CCA ignored *Penry*'s command to examine the particular mitigating evidence offered by a capital defendant and determine whether or not, as a practical matter, the instructions given to the jury under Texas' former special issue scheme put that evidence beyond the jurors' "effective reach." Instead, the CCA interposed a set of rules of its own design purporting to define the limits of *Penry* and holding specifically that mitigating evidence could pose no

Penry problem unless it was as severe as Penry's own and possessed an explicit causal "nexus" to the crime. In this respect, the CCA's methodology was indistinguishable from the one dismissed in *Tennard* as having "no foundation in the decisions of this Court." 542 U.S. at 284. Above and beyond this flawed methodology (though produced by it), the decision of the CCA was objectively unreasonable under *Penry* because no principled distinction can be drawn between the circumstances of Mr. Brewer's case and those which led the Court to grant relief in *Penry* itself.

In the final analysis, neither the Fifth Circuit nor the CCA ever directly confronted the constitutionally controlling question under *Penry* and *Johnson*: whether jurors could give meaningful consideration and effect to the relevant mitigating qualities of Mr. Brewer's abused childhood and mental illness. Neither court offered any commonsensical explanation of how these mitigating circumstances could have been understood to *make Mr. Brewer less dangerous*, so that they would have been within the jurors' effective reach in answering the "future dangerousness" issue. Realistically, Mr. Brewer's evidence of his abused childhood and psychological impairment could have served only to support the inference that he *would* probably continue to be dangerous in the future – an inference that the prosecutor forcefully urged jurors to draw. *Tennard*, 542 U.S. at 288-89 (a reasonable juror might give evidence of cognitive impairment aggravating effect under the future dangerousness question "as a matter of probable inference from the evidence"). Because the former Texas special issues gave Mr. Brewer's jurors no "meaningful basis" for considering the relevant mitigating qualities of those factors but treated them as exclusively and decisively aggravating, Mr. Brewer's death sentence cannot stand.

ARGUMENT

A. THE FORMER TEXAS SPECIAL ISSUES AFFORDED MR. BREWER'S JURY NO MEANINGFUL BASIS FOR GIVING EFFECT TO THE RELEVANT MITIGATING QUALITIES OF HIS ABUSED CHILDHOOD AND MENTAL IMPAIRMENT.

1. Mr. Brewer's mitigating evidence was extensive and powerful.

Mr. Brewer's mitigating evidence included both violent abuse as a child and mental impairment resulting from emotional instability as a young adult. This Court has recognized these very circumstances as ones which could justifiably motivate jurors to impose a life sentence. Exposure to family violence is unquestionably mitigating. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (the fact that the defendant's "father, who had a vicious temper, frequently beat [defendant's] mother, leaving her bruised and black-eyed," was mitigating) (citation and internal quotation marks omitted).[2] Being victimized by child abuse is mitigating. *Rompilla*, 545 U.S. at 392 (the defendant "was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks.") (citation and internal quotation marks omitted).[3] This

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[2] *See also, e.g.*, *Burger v. Kemp*, 483 U.S. 776, 790, 790 n.7 (1987) (expressing "no doubt" that the fact that defendant's stepfather "beat his mother in petitioner's presence when he was 11" was "relevant mitigating evidence").

[3] *See also, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 534-35 (2003) (describing the mitigating evidence counsel failed to discover – including physical abuse at the hands of his mother and foster parents – as "powerful," being "the kind of troubled history we have declared relevant to assessing . . . moral culpability."); *Penry II*, 532 U.S. at 796 (evidence of child abuse was mitigating); *Williams v. Taylor*, 529 U.S.

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Court has also consistently reaffirmed that emotional problems or mental impairments are mitigating. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("[e]vidence of ... emotional disturbance is typically introduced by defendants in mitigation"); *Bell v. Ohio*, 438 U.S. 637, 641-42 (1978) (reversing death sentence where the sentencer could not consider evidence that the defendant "was mentally deficient ... because of his drug problem and emotional instability"); *Penry*, 492 U.S. at 319 (a defendant's "emotional and mental problems" can reduce his culpability).[4]

2. The "deliberateness" special issue did not afford an adequate vehicle for the jurors to consider and give effect to Mr. Brewer's evidence.

The deliberateness inquiry afforded no vehicle for meaningful consideration of Mr. Brewer's mitigating evidence because it required no assessment of his moral

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362, 398 (2000) (evidence that Williams was, *inter alia*, physically mistreated as a child "might well have influenced the jury's appraisal of his moral culpability"); *Parker v. Dugger*, 498 U.S. 308, 314 (1991) ("no question" that evidence of Parker's "difficult childhood, including an abusive, alcoholic father," was mitigating); *Penry*, 492 U.S. at 322 (agreeing that evidence of childhood abuse was "relevan[t] to his moral culpability"); *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982) ("[e]vidence of a difficult family history [of physical abuse at the hands of one's father]" is mitigating).

[4] *See also, e.g., Tennard*, 542 U.S. at 288 (defendant's "[i]mpaired intellectual functioning" was mitigating); *Williams*, 529 U.S. at 398 (evidence of Williams' mental impairments "might well have influenced the jury's appraisal of his moral culpability"); *Buchanan v. Angelone*, 522 U.S. 269, 278 (1998) (jury instructions permitted consideration of defendant's "family background and mental and emotional problems"); *McKoy v. North Carolina*, 494 U.S. 433, 437 (1990) (jury instruction precluded consideration of evidence that McKoy, *inter alia*, exhibited signs of mental or emotional disturbance).

culpability.[5] *Penry* recognized this basic shortcoming. *Penry*, 492 U.S. at 322 ("Personal culpability is not solely a function of a defendant's capacity to act 'deliberately' "); *id.* at 323 (absent additional instructions, a juror who believed that Penry's mitigating circumstances "diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime 'deliberately.' "). Tellingly, since *Penry* this Court has never upheld a Texas death sentence on the theory that the "deliberateness" issue afforded the defendant's evidence adequate consideration. Nor could it do so here.[6]

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[5] The "deliberateness" question was originally designed to ensure that the *mens rea* of defendants convicted under a theory of vicarious liability satisfied the Eighth Amendment. Such a finding was necessary because, although a capital murder conviction in Texas typically requires an "intentional" killing, persons convicted under Texas' "law of parties" need not themselves have intended to kill. *See* Tex. Pen. Code §§7.01, 7.02. The post-*Penry I* statute clarified this by substituting a new *mens rea* question applicable only to persons convicted under the "law of parties." *See* Tex. Crim. Proc. Code Ann. art. 37.071, §2(b)(2) (Vernon 2002). Given that the "deliberateness" inquiry was never intended as a vehicle for assessing moral culpability, it comes as no surprise that Texas courts came to treat it simply as confirming the presence of a culpable mental state vaguely "more than intent but . . . less than premeditation." *Bigby v. State*, 892 S.W.2d 864, 890 (Tex. Crim. App. 1994).

[6] *Penry I* suggests that the deliberateness question might enable meaningful consideration of mitigating evidence if the key term were defined so as to focus jurors on broadly assessing the defendant's moral culpability. *Penry*, 492 U.S. at 323. The instruction here, however, simply recited a "premeditation" formula, directing jurors that "deliberately" meant "a manner . . . resulting from careful and thorough consideration," "awareness of the consequences," "willful," "allowing time for a decision." *See* JA 8-90. Further, the jury had already convicted Mr. Brewer of an "intentional" killing, and the prosecutor had emphasized during voir dire that the only difference between "deliberately" and "intentionally" was that the former required "more planning." *See, e.g.*, voir dire of juror Stafford, XI RR 1656) (deliberately "is

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3. The "future dangerousness" special issue afforded no vehicle for the jury to consider and give effect to the relevant mitigating qualities of Mr. Brewer's abused childhood and mental impairment.

Mr. Brewer's evidence of his abused childhood and mental impairment possessed the same relationship to the second special issue as Penry's evidence of an abused childhood and mental retardation. *See Tennard*, 542 U.S. at 288 (suggesting *Penry* error where "[t]he relationship between the special issues and Tennard's low IQ evidence ha[d] the same essential features as the relationship between the special issues and Penry's mental retardation evidence"). That is to say, the circumstances offered as factors in mitigation tended to *explain*, rather than *rebut*, the strong inference of Mr. Brewer's dangerousness. The prosecuting attorney's closing argument took advantage of this commonsense inference in urging the jurors that Mr. Brewer came within the plain language of the "continuing threat" inquiry, no matter how blameless he might have been for the person he became: "And, you know, folks, you can take a puppy, and you can beat that puppy and you can make him mean, but if

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somewhat similar to" intentional, but would "require more planning, more thinking beforehand. . . ."); *see also* XII RR 1859, VI RR 620-22, X RR 1447, 1452-53 (comparable voir dire of jurors Stephen, Ambers, and Needham). Jurors might have concluded that Mr. Brewer committed the crime "deliberately" in the manner thus described, but yet that Mr. Brewer's abused background and mental illness reduced his moral culpability so as to make a death sentence unwarranted. *See Penry*, 492 U.S. at 322-23. Under those circumstances, their instructions required them to answer the "deliberateness" question "yes," calling for a death sentence. In short, particularly against the backdrop of the prosecutor's comments, the definition of "deliberately" in the charge was inadequate to transform the limited *mens rea* inquiry framed by the first special issue into an evaluation of Mr. Brewer's moral culpability.

that dog bites, he is going to bite the rest of his life, for whatever reason. *Whatever got him to this point, he is what he is today. And that will never change. That will never change.*" JA 118 (emphasis added). This Court recognized in *Tennard* the deadly effect of such a "future dangerousness" argument. *See Tennard*, 542 U.S. at 289 (jurors might have given Tennard's low IQ evidence aggravating effect under the future dangerousness issue in part "because the prosecutor told them to do so" by arguing that Tennard's low IQ was "really not the issue" and that the focus of the question was "the fact that he is a danger," rather than "the reasons why he became a danger"). Here, just as in *Tennard*, the prosecutor "pressed exactly the most problematic interpretation of the special issues" when he ruled out consideration of "whatever got [Mr. Brewer] to this point" and directed the jurors to focus instead on "what he is today." *Id.*

No court in this case has offered any theory of how a history of being abused renders a defendant like Mr. Brewer less dangerous, and common sense teaches the opposite. Experts recognize that children and teenagers subjected to abuse may act out violently due to impaired impulse control.[7] Lay experience confirms this connection.

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[7] *See, e.g., Chris Mallett, Socio-Historical Analysis of Juvenile Offenders on Death Row*, 39 [No. 4] CRIM. LAW BULLETIN 3 (July 2003) at 2 (researchers have documented that "physical and psychological maltreatment" of children "is associated with aggressive behaviors," and that "[l]ong-standing psychological and behavioral impairments are often the outcomes of [childhood] physical abuse"); Dorothy Otnow Lewis, *From Abuse to Violence: Psychophysiological Consequences of Maltreatment*, 31 J. AM. ACAD. CHILD AND ADOLESCENT PSYCHIATRY 383 (1992) at 383-85 (children who have been physically abused tend to behave more aggressively); JAMES GARBARINO & ANNE C. GARBARINO, MALTREATMENT OF ADOLESCENTS (National Committee for Prevention of Child Abuse, 1982) (severe punishment correlates with increased future aggression).

See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 788-89 (1982) (Rehnquist, J., joined by Burger, C.J., and White and O'Connor, JJ., dissenting on other grounds) ("A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens").

Impaired mental or psychological functioning likewise undermines a person's judgment and capacity to appreciate the appropriateness and likely consequences of his actions. *Penry* recognized that those features of mental impairment would tend to persuade jurors that the impaired defendant would likely be dangerous in the future. Yet the same aspects of mental impairment reduce the defendant's moral culpability and call the fitness of a death sentence into question. *Skipper v. South Carolina*, 476 U.S. 1, 13-14 (1986) (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring in judgment) (a defendant's "reduced capacity for considered choice" and his "emotional history" both "bear directly on the fundamental justice of imposing capital punishment"); *see, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005); *Atkins v. Virginia*, 536 U.S. 304, 318 (2002); *Thompson* v. *Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion). A forced choice in answering the unadorned future-dangerousness question "yes" or "no" gave jurors no way to express the conclusion that notwithstanding Mr. Brewer's probable dangerousness, a death sentence would be excessive for him in light of his mental impairment and abused background, and the bearing of those factors on his moral culpability for the crime. In this respect, too, this case is squarely controlled by *Penry*.

Moreover, and as the District Court emphasized in granting relief, the evidence in this case reflected that Mr. Brewer's involuntary commitment to a mental hospital, based on his suicidal behavior, occurred "just three months before the murder." JA 187. Given the short time interval involved, jurors likely drew an intuitive connection between Mr. Brewer's struggle with mental illness and the violent outburst that took Mr. Laminack's life. Focusing on that link, jurors would have been particularly likely to conclude – faced with the prosecutor's forceful argument that Mr. Brewer was a beaten puppy who would "bite [for] the rest of his life" and "never change" – that Mr. Brewer's mitigating circumstances simply contributed to the probability that he "would commit criminal acts of violence that would constitute a continuing threat to society." JA 118.

4. The prosecutor repeatedly reinforced that the special issues posed a narrow inquiry and emphatically discouraged the jurors from viewing the special issues as permitting a broad assessment of Mr. Brewer's moral culpability or the appropriate sentence in light of all the evidence.

This Court has explained that in assessing whether a jury charge precluded the jury from considering or giving effect to a defendant's mitigating evidence, the reviewing court must consider the context of the entire trial. *See, e.g., Boyde v. California*, 494 U.S. 370, 380-83 (1990); *see also, e.g., Ayers v. Belmontes*, ___ U.S. ___, 127 S. Ct. 469 (2006). One key part of that context is what the jurors were told, during voir dire and closing argument, about how to reach their decision. Here, the prosecutors repeatedly told jurors to answer the special issues literally on the facts, warning them not to undertake any broader

inquiry into the defendant's culpability or consider the appropriateness of the sentence required by their factual "yes" or "no" answers to the "deliberateness" and "future dangerousness" questions.

Jurors received no indication that the "deliberateness" issue concerned anything other than the defendant's *mens rea* prior to the crime, and were told that the distinction between killing "intentionally" (the *mens rea* applicable to the underlying offense under Tex. Pen. Code §19.03) and killing "deliberately" was simply that the latter required "more planning." *See* n. 6 *supra*. Such guidance did not prepare jurors to view their answer to the "deliberateness" inquiry as expressing their judgment about Mr. Brewer's personal moral culpability in light of his history of child abuse and his psychological impairment as a young adult. The prosecutors' closing argument about the first special issue reflected the same perspective, emphasizing Mr. Brewer's state of mind immediately prior to and during "the act of the killing" as sufficient to support an affirmative answer. *See, e.g.*, JA 116 ("But the act itself, the act of the killing, wanting the money, wanting the man dead, how much more deliberate can you get?"); *see also* JA 99.

During voir dire, the prosecution also instructed the jurors that the "future dangerousness" question did not invite them to express their conclusion about the appropriate sentence in light of all the evidence. Rather, the prosecutors stressed, jurors were to exercise no "discretion" in answering either question; they were duty-bound to answer the questions strictly according to the evidence. For example, after explaining the special issue scheme, a prosecutor told juror White that it was "this Court, not the jury," that must assess death. VIII RR 1091. He emphasized that the "decision about what punishment is to be assessed really lies within the laws of the State," adding that "the Judge

doesn't have any discretion in the punishment" and that the jury would simply be "answering questions about the evidence itself." *Id.* As he did with other jurors, the prosecutor also took care to elicit juror White's agreement to "answer [those] questions ... without considering what punishment the Court must assess" in light of the answers. *Id.* at 1092-93.

The prosecutor made the same point to juror Needham, stressing that it would be "improper" for Needham, after hearing the evidence, to "determine ... that this person should get life imprisonment," and then "answer a [special issue] question 'no' contrary to the evidence, just so the defendant will get the punishment [you] think is proper." X RR 1460. He demanded to know whether Needham could answer the questions "solely upon the evidence and put aside the fact that the [answers] would require ... death or life imprisonment." *Id.* at 1460-61. He repeated that "the law ... takes away from a juror the ability [to] say, this person should get life [or] this person should die." *Id.* at 1461. The prosecutor assured Needham that only by adhering to the literal meaning of the special issues could he give both sides "a fair trial." *Id.* at 1461.

The prosecutor likewise warned juror Robertson that the jurors would not be asked "what needs to be done to this particular defendant for committing this act." XIII RR 1969. He explained that under the special issue format, "there's not a lot of discretion that's really allowed to a jury," because the law would require them to answer the special issues "yes" or "no" as the evidence dictated. *Id.* at 1970. The prosecutor emphasized again that to treat the special issues as making any broader inquiry into moral culpability would deny both parties "a fair trial:"

> For the State and the Defendant to receive a fair trial, you have to answer those according to . . . the evidence submitted, without regard to the punishment that this Court must assess. It's very important that jurors be able to do that because their job is not to determine whether a person goes to the penitentiary for life imprisonment or whether the person should be executed. . . . What's important is that the jury . . . answer those questions 'yes' or 'no' based solely upon the evidence. . . .

Id. at 1972-73.[8]

During voir dire, then, the prosecutors told the jurors to treat the special issues as literally as possible, and not to respond to them as a license to exercise "discretion" in an attempt to achieve an appropriate sentence in response to the evidence as a whole.

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[8] *See also, e.g.*, XII RR 1853 (prosecutor to juror Stephen: "Our law says the jurors can't do that [answer the special issues to ensure that a particular sentence is imposed]. Our law says that the jury has to answer those questions according to the evidence. And basically, the law requires a juror be able to answer those without considering what the result of the answers may be;" prosecutor elicits juror's agreement to "answer those questions . . . according to the evidence, without regard to the punishment that this Court must assess"); XI RR 1652 (prosecutor to juror Stafford: "The laws of this State require that *if you feel that life imprisonment is a proper form of punishment, you set that feeling aside and render your decision according to those answers [sic] the way they should be answered under the evidence that you hear*") (emphasis added); VI RR 624 (prosecutor to juror Ambers: "*[Y]ou don't have any discretion from the standpoint of what punishment is assessed, . . .* this Court has no discretion at [sic] what punishment is assessed. . . . [T]he way these questions are answered determines what punishment is going to be applied") (emphasis added), *id.* at 626 (prosecutor to juror Ambers: "[O]ur law says that you must render a decision . . . according to the evidence that you hear. [Could you] answer those questions according to the evidence without considering . . . what the law of this State may require this Judge to do as far as the punishment?").

The punishment-phase closing arguments of both parties likewise reflect the inadequacy of the pre-1991 special issues as applied to Mr. Brewer's mitigating evidence. Unsurprisingly, defense counsel never argued that Mr. Brewer's background of physical and psychological abuse and his mental illness could support an honest "no" answer to the "future dangerousness" question. Instead, after reviewing the State's evidence in favor of a finding of "future dangerousness," defense counsel simply said, "I'm fixing to sit down now, but I want you to realize that this is what we're here for. *You're determining what to do about Brent* in answering those special issues." JA 107 (emphasis added). In the same vein, Penry's defense counsel initially "urged the jury to answer the first special issue 'no' because it would be the just answer, and [a] proper answer." *Penry*, 492 U.S. at 325. Ultimately, defense counsel here, like his counterpart in *Penry*, was foreclosed from arguing that jurors could reason meaningfully from the nature of the mitigating evidence to a negative finding on the "future dangerousness" question, and so for all practical purposes simply pleaded for nullification.

The prosecutor here, like his counterparts in *Penry* and *Smith*, responded to defense counsel's plea for mercy by demanding that jurors honor their oath to answer the special issues honestly according to the evidence. He specifically echoed his own comments from voir dire, insisting that for the jurors to do otherwise than address the special issues factually on the evidence would deny both parties "a fair trial:"

> Contrary to what [defense counsel] would have you believe, I don't have the power to say whether [Mr. Brewer] lives or dies. *You don't have the power to say whether he lives or dies. You answer the questions according to the evidence, [j]ust like you did at the guilt or innocence. That's all. It's not a matter of*

> *life or death.* It's whether it was deliberate. Was this act deliberate? Will he continue to commit violent acts? *That's all you answer.* And every one of you people told me you would base that not on the result, but upon what the evidence dictates you must do. If you do that and he gets life, a fair trial is had. If you do that and he dies tomorrow, a fair trial was held. You have to do your job. I have to do mine. And these people have to do theirs. And if everyone does their job, a fair trial results.

JA 114-15 (emphasis added).[9] The prosecutor also argued that even if Mr. Brewer's background had resulted in his being dangerous, his dangerousness was all that mattered:

> And, you know, folks, you can take a puppy, and you can beat that puppy and you can make him mean, but if that dog bites, he is going to bite the rest of his life, for whatever reason. *Whatever got him to this point, he is what he is today. And that will never change.* That will never change.

JA 118 (emphasis added).[10]

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[9] Undeniably, the prosecutor hoped jurors could be led to feel no personal moral responsibility for Mr. Brewer's fate. That impression could readily be conveyed by emphasizing the narrowness of the special issues presented for the jury's decision under the pre-1991 Texas scheme; the circumstances of this case raise a serious question whether the jurors whose verdict resulted in Mr. Brewer's death sentence were conscious of their important role in expressing the community's sentiment about the appropriate sentence, which lies at the heart of the individualization requirement. Justice Breyer has recognized the importance of following "procedures that will help assure that, *in a particular case*, the community indeed believes application of the death penalty is appropriate. . . ." *Ring v. Arizona*, 536 U.S. 584, 618 (2002) (Breyer, J., concurring) (emphasis added); *see also Smith*, 543 U.S. at 38 (jurors' instructions must enable them to perform the essential task of "choosing the defendant's appropriate sentence").

[10] This Court confronted a similar prosecutorial argument in *Tennard*: "[W]hether he has a low IQ or not is not really the issue.

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The prosecutor summed up his argument by pointing once again to the jurors' sworn obligation to answer the special issues according to the evidence, not according to what sentence they thought was appropriate in light of that evidence:

> But you go back there and look at the wounds it took to kill this man. And if you come back with an answer "no" [to the "deliberateness" question], you're not looking. . . . You can't get more deliberate than . . . that. If you feel comfortable that he will be walking in any society, in the penitentiary or anyone [sic] else, and he will not be a continuing threat to whoever is around him, that can be your decision. . . . *But base your decision on what's dictated according to the facts and not on what punishment must be assessed. Do what the facts say, answer the questions according to the law, and a fair trial will be held.*

JA 118-19 (emphasis added). This argument is precisely the type of entreaty that this Court identified in *Penry* and *Smith* as manifesting the failure of the pre-1991 special issues to permit meaningful consideration of mitigating evidence. *See Penry*, 492 U.S. at 325 ("You've all taken an oath to follow the law. . . . [Y]our job as jurors and your

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Because the legislature, in asking you to address that question, the reasons why he became a danger are not really relevant. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question." *Tennard*, 542 U.S. at 288-89. The prosecutor's closing argument against Mr. Brewer – that "[w]hatever got him to this point, he is what he is today. And that will never change" – had precisely the same impact. Both arguments "press[] exactly the most problematic interpretation of the special issues," by painting the defendant's most important mitigating evidence as "irrelevant in mitigation, but relevant to the question whether he posed a future danger." *Tennard*, 542 U.S. at 289.

duty as jurors is not to act on your emotions, but to act [on] the evidence that you have heard in this courtroom, then answer those questions accordingly"); *Smith*, 543 U.S. at 48 n.5 (prosecutor argued that jurors "had promised to 'follow the law' and return a 'Yes' answer to the special issues [if] the State met its burden of proof"). Here, as in those cases, the argument only compounded the problem presented by the special issues themselves.

In the past, this Court has assumed that the former Texas special issues system permitted jurors to "exercise a range of judgment and discretion," *Johnson*, 509 U.S. at 370, when that interpretation of the process "accord[ed] with a 'commonsense understanding' of how the jurors were likely to view their instructions . . . ," *id.* Here, however, the fact that the jurors in Mr. Brewer's case were told repeatedly and explicitly that they were *forbidden* to exercise any discretion in answering the special issues makes it highly unlikely that in doing so they weighed Mr. Brewer's mitigating evidence "in a manner similar to that employed by capital juries in 'pure balancing' States." *Id.* at 370-71 (citation omitted).

B. IN REVERSING THE DISTRICT COURT'S JUDGMENT THAT *TENNARD* COMPELLED RELIEF, THE FIFTH CIRCUIT CREATED NEW AND INSUPPORTABLE "CONSTITUTIONAL DISTINCTION" THAT SIMPLY RESURRECTS THE "SCREENING TESTS" REJECTED BY THIS COURT IN *TENNARD*.

The District Court below recognized that *Tennard* and *Penry* required relief from Mr. Brewer's death sentence. *See* JA 194-96. In reversing that judgment, the Fifth Circuit did not painstakingly examine the record to justify

the conclusion that Mr. Brewer's mitigating evidence could have been given meaningful consideration under the special issues in light of everything that took place at his trial. Rather, the Fifth Circuit discounted the significance of Mr. Brewer's mitigating evidence by applying new "constitutional distinctions" that effectively resurrected the "screening tests" condemned in *Tennard*.

First, the Fifth Circuit altogether ignored the state court's basis for rejecting Mr. Brewer's *Penry* claim. Indeed, other than mentioning the prior state court decisions in reciting the procedural history of the case, *see* JA 216, there is no analysis at all in the Fifth Circuit's opinion of the CCA's approach. *Cf. Penry*, *Tennard*, and *Smith*. Had the Fifth Circuit undertaken that analysis, it would have found that the CCA denied relief because Mr. Brewer allegedly demonstrated no "nexus" between his mitigating evidence and his crime, and further because the CCA perceived Mr. Brewer's child abuse and mental impairment as insufficiently "severe" to implicate *Penry*. *See* Section C *infra*. *Tennard*, of course, condemned such preconditions for applying *Penry* as lacking any basis in this Court's jurisprudence. *See Tennard*, 542 U.S. at 284.

Second, apart from ignoring the CCA's reliance on the now-discredited conceptual framework of "nexus" and "severity," the Fifth Circuit failed to improve on that framework with its new "constitutional distinction" between violent physical abuse suffered as an adolescent (as in Mr. Brewer's case) versus the same mistreatment suffered as a younger child (as in *Penry*). JA 223 n.16. Nothing in any opinion of this Court suggests that the relevant mitigating qualities of being physically mistreated as an adolescent are any different than those of

being abused as a child,[11] and the recourse to such categorical, mechanistic reasoning is just what *Tennard* denounced. Equally important, as a result of its reliance on such categorical analysis in the *Penry* context, the Fifth Circuit has consistently failed to consider how a defendant's mitigating evidence was actually presented and argued at trial, as required under *Boyde*.[12]

Nor can the Fifth Circuit's analysis be upheld on the theory that evidence of child abuse can be given meaningful mitigating effect in answering the future dangerousness question, not least because *Penry* held squarely to the contrary. The Fifth Circuit's attempt to limit *Penry* by suggesting that the child abuse evidence in Mr. Brewer's case was more like the background evidence in *Graham v. Collins*, 506 U.S. 461 (1993), than the child abuse evidence in

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[11] Nor does available research appear to support any such inference. *See, e.g.*, sources cited in n.7, *supra*.

[12] *Garcia v. Quarterman*, 456 F.3d 463 (5th Cir. 2006), illustrates the Fifth Circuit's continuing noncompliance with *Penry*. Garcia argued that the jury was unable to give mitigating effect to evidence that he had been sexually abused as a young child. *Id.* at 468-71. The Fifth Circuit majority found no *Penry* error, asserting that defense counsel was *required to argue for jury nullification* at trial (*i.e.*, to demand that the jurors violate their oaths to answer the special issues honestly) in order to preserve a claim that his client was harmed by the preclusive effect of the "nullification" charge condemned in *Penry II* and *Smith*. *Id.* at 472. It rejected "the . . . position that any evidence of childhood abuse must be considered under *Penry* regardless of [how] it was offered at trial." *Id.* In other words, the Fifth Circuit *will* consider the full context of trial in evaluating a *Penry* claim – but only as an innovative basis for denying relief. As Judge Benavides regretfully noted in dissent, *Garcia* shows that the Fifth Circuit persists in applying *Penry* by crafting new "screening tests," despite this Court's clear holdings to the contrary. *See Garcia*, 456 F.3d at 479 (Benavides, J., dissenting) (majority's approach makes "an end run" around *Penry*, is at odds "at least with the spirit of *Tennard*" and introduces another "threshold screening test . . . [unfounded in] Supreme Court precedent").

Penry, *see* JA 223-26, misstates *Graham*'s holding and broadly erodes the basic distinctions between *Graham* and *Penry*.

This Court in *Graham* was not called upon to define the scope of *Penry*, because Graham was not entitled to the benefit of *Penry* in any event. *Graham*, 506 U.S. at 477.[13] Moreover, the Court's analysis of how Graham's background evidence fared under the special issues responded to the nature of that evidence and how it was presented and argued at trial – aspects of Graham's case that, in every regard, contrast with Penry's and Mr. Brewer's.

Graham's youth, being inevitably transient, bore straightforward mitigating relevance to his future dangerousness. *Graham*, 506 U.S. at 475-76. Regarding Graham's background, the Court emphasized that Graham "offered testimony ... concerning his upbringing and positive character traits" that painted him as a "real nice, respectable" person who "would pitch in on family chores" and supported his own children. *Graham*, 506 U.S. at 463-64. Graham's grandmother, with whom he had stayed from time to time as a child during his mother's periodic hospitalizations for a "nervous condition," attested that Graham was "never ... violent or disrespectful," "attended church regularly," and "loved the Lord." *Id.* at 464. This portrayal permitted defense counsel to argue in closing that "Graham's criminal behavior [w]as aberrational," and on that basis counsel "vigorously urged the jury to answer 'no' to the special issues." *Id.* at 464, 475. Contrary to the Fifth Circuit's characterization, *see* JA 223 n.16, *Graham* did not

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[13] *Graham* applied *Teague v. Lane*, 489 U.S. 288 (1989), to hold that in 1984, five years prior to *Penry*, existing law did not *dictate* the conclusion Graham urged – that his youth and background evidence could not be given mitigating effect without additional instructions beyond the former special issues. *Graham*, 506 U.S. at 477.

involve evidence of a "troubled childhood." This Court nowhere described Graham's background in those terms. Instead, Graham's evidence was offered to highlight his positive character traits and portray him as an excellent prospect for rehabilitation. Thus framed, such evidence, like Graham's youth itself, tended naturally to support a "no" answer to the question whether Graham posed a continuing threat to society. None of these aspects of *Graham* resemble Mr. Brewer's case, in which defense counsel presented evidence of Mr. Brewer's abused background and mental impairment to help jurors understand why he came to commit murder, rather than to prove he had positive character traits showing a capacity for rehabilitation. These distinctions make the Fifth Circuit's strained attempt to invoke *Graham* to dismiss Mr. Brewer's evidence of child abuse – and thereby to circumscribe *Penry* – untenable.[14]

While defense counsel in *Graham* explicitly connected Graham's mitigating evidence to negative answers to the special issues, neither party at Mr. Brewer's trial made any argument that Mr. Brewer's abused childhood logically warranted a "no" answer to the "future dangerousness"

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[14] Moreover, *Graham* also expressly likened Graham's background evidence to that in *Jurek v. Texas*, 428 U.S. 262 (1976), which included "evidence reflecting *good character traits* such as steady employment and helping others." *Graham*, 506 U.S. at 466 (emphasis added) (quoting the Fifth Circuit's description of Graham's evidence); *id.* at 476 (agreeing that "Graham's evidence . . . more closely resembles Jurek's evidence of age, employment history, and familial ties than it does Penry's evidence of mental retardation and harsh physical abuse"). The plain import of this observation is that *Graham* and *Jurek* involved evidence of *positive* character traits (good work history and familial ties), not evidence of the *destructive* effects of child mistreatment. Indeed, this very passage of *Graham* reemphasizes that under *Penry*, evidence of "harsh physical abuse" like that suffered by Mr. Brewer as an adolescent falls outside the scope of the special issues.

question, and no reason exists to assume that jurors would have drawn such a counter-intuitive inference on their own. *See* Section A *supra*. Indeed, the prosecutor argued to the contrary, urging that Mr. Brewer's experience of abuse made him more dangerous. "And, you know, folks, you can take a puppy, and you can beat that puppy and you can make him mean, but if that dog bites, he is going to bite the rest of his life, for whatever reason. *Whatever got him to this point, he is what he is today. And that will never change. That will never change.*" JA 118 (emphasis added). Any speculation that the jury understood Mr. Brewer's history of child abuse as reducing his likely "future dangerousness" would be inconsistent with both common sense perceptions and judicial assessments of the relationship between abusive backgrounds and future dangerousness.[15]

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[15] Childhood abuse is understood to have long-term effects, *see, e.g.*, *Williams*, 529 U.S. at 398; *Santosky*, 455 U.S. at 788-89 (dissenting opinion), and no responsible expert would suggest that there is a knowable endpoint to the destructive consequences of such experiences. *See, e.g.*, n.7 *supra*. Respondent has not identified any case in which a capital defendant offered evidence of such abuse to support the inference that such trauma has only fleeting impact and tends to support a prediction of non-dangerousness. Moreover, the Fifth Circuit and other courts, in rejecting claims of ineffective assistance of counsel challenging counsel's failure to develop or present evidence that the defendant was abused as a child, have recognized that jurors can infer future dangerousness from such evidence. *Mann v. Scott*, 41 F.3d 968, 983-84 (5th Cir. 1994) (endorsing as reasonable the strategic decision by Mann's trial counsel "not to introduce evidence of [Mann's] . . . abusive childhood because such evidence had a 'double-edged' nature which may have harmed Mann's case" under the Texas special issues); *Rector v. Johnson*, 120 F.3d 551, 564 (5th Cir. 1997) (excusing counsel's decision not to introduce evidence that the defendant "suffered from child abuse, family instability, a poor educational background, low IQ, gunshot injuries, and that his mother was severely and chronically mentally ill," because counsel reasonably feared that under the former Texas statute "the jury might very well consider that evidence aggravating, rather than mitigating"); *Kitchens v. Johnson*, 190 F.3d 698, 701-02 (5th

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As for the Fifth Circuit's refusal to find *Penry* error based on Mr. Brewer's mental impairment, that conclusion, too, turned upon the court's perpetuation of its pre-*Tennard* categorical limitations upon the scope of *Penry*. *See* JA 227 ("mental illness [is not] tantamount to mental retardation for the purposes of our [*Penry*] case law"); JA 228 ("not . . . one iota of evidence suggest[s] either that Brewer's [clinical depression] is permanent or that he experienced cognitive limitations of any sort as a result"). *Tennard* forecloses these refurbished models of the Fifth Circuit's long-time "severity" screen for mental ailments. Jurors could well have found that Mr. Brewer's psychiatric impairment undermined his culpability. Yet, as with Penry's mental retardation, the fact that Mr. Brewer was suicidal and suffered a major depressive episode shortly before the crime was relevant to dangerousness, if at all, only as aggravating; his chances of receiving a "no" answer would actually have been improved had jurors not heard that evidence.[16]

Cir. 1999) (counsel acted reasonably in not presenting, *inter alia*, "evidence of child abuse" at defendant's 1986 trial because of its "double-edged" quality under the former Texas statute); *Lovitt v. True*, 403 F.3d 171, 179-80 (4th Cir. 2005) (trial counsel acted reasonably in not presenting evidence of defendant's destructive family background because the prosecution was focusing on future dangerousness and such evidence might have "suggest[ed] violent tendencies"). Nor can Respondent credibly assert that evidence of mental impairment is generally associated with non-dangerousness and proffered for that purpose. *See, e.g., Martinez v. Dretke*, 404 F.3d 878, 889-90 (5th Cir. 2005) (counsel acted reasonably in not introducing evidence of defendant's "organic brain damage" in a 1989 trial because it would have "increased the likelihood of a future dangerousness finding"); *Walker v. True*, 401 F.3d 574, 582-83 (4th Cir. 2005) (counsel acted reasonably in not introducing evidence of defendant's "mental incapacity" because she concluded that it "would tend to support the government's argument that he constituted a future danger").

[16] There is a widespread perception, accurate or not, that those suffering from mental disability or disorder are likely to be dangerous.

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Nor can the decision below be salvaged on the ground that Mr. Brewer's mental impairment might conceivably be treatable – the basis on which the Fifth Circuit has categorically ruled out *Penry* relief in most cases involving mental illness.[17] No evidence before the jury indicated that Mr. Brewer's mental illness was treatable. And even if the jurors could have imagined that treatment was available,

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See, e.g., JOHN MONAHAN, ET AL., RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE 2001 at 3 ("Beliefs about the causes of mental disorder have changed over the centuries, but the belief that mental disorder presupposes many of those suffering from it to behave violently has endured"); Ann Hubbard, *The ADA, the Workplace, and the Myth of the 'Dangerous Mentally Ill,'* 34 U.C. DAVIS L. REV. 849, 850-51 (Summer 2001) ("Surveys consistently show that the public harbors widespread fear of 'the mentally ill,'" and that over the past 50 years "the dangerousness stereotype has . . . probably increased"); Harold I. Kaplan & Benjamin J. Sadock, *Synopsis of Psychiatry: Behavioral Sciences*, CLINICAL PSYCHIATRY 873 (8th ed. 1998) (acknowledging "the fear with which some people regard all psychiatric patients," though "few [patients] are an authentic danger to others"); Susan G. Goldberg, Mary B. Killeen, & Bonnie O'Day, *The Disclosure Conundrum: How People With Psychiatric Disabilities Navigate Employment*, 11 PSYCH. PUB. POL. AND L. 463, 491-92 (September 2005) ("[N]egative feelings toward people with psychiatric disabilities [derive] from the fear that [such people] are dangerous"); Behney, C., Hall, L.L., & Keller, J., *Psychiatric Disabilities, Employment, and the Americans With Disabilities Act* (background paper; Washington, D.C.: Office of Technology Assessment, 1997) at 7 (calling "the homicidal maniac" a "prevalent and damaging" stereotype of mental illness); Phelan, G.C., Link, B.G., Stueve, A., and Pescosolido, B.A., *Public Conceptions of Mental Illness in 1950 and 1996: Has Sophistication Increased? Has Stigma Declined?*, 41 JOURNAL OF HEALTH AND SOCIAL BEHAVIOR 188 (2000) (although media depictions of people with psychiatric disabilities are improving, negative articles continue to dominate the news and emphasize dangerousness).

[17] *See, e.g.*, JA 227-28; *Coble v. Dretke*, 444 F.3d 345, 359-60 (5th Cir. 2006) (no *Penry* problem because defendant's post-traumatic stress disorder and bipolar disorder could be ameliorated by medication); *Hernandez v. Johnson*, 248 F.3d 344, 349 (5th Cir. 2001) (no *Penry* problem because defendant's mental illness could be controlled by treatment).

and predicted how effectively it might control the dangerous tendencies of Mr. Brewer's illness, those several steps of cumulative guesswork would only have reduced, not reversed, the aggravating potential for his likely future dangerousness of the fact that he was mentally ill. The "signature qualities" of mental impairment – unlike those of youth, *see Johnson*, 509 U.S. at 368 – are not transient. It would have been speculative at best for jurors to assume that Mr. Brewer's mental illness, even if treated, would not in the future substantially impair his judgment or behavior in a way that would make him act out dangerously again. Certainly, jurors were not required to infer that Mr. Brewer would necessarily receive any such treatment or care in the prison system. In short, there was abundant evidence from which the jury "might well have" concluded, as this Court put it in *Tennard*, that Mr. Brewer's mental impairment made him a future danger to society, regardless of the "treatability" of his psychological impairment.[18]

Moreover, a focus on the potential "treatability" of Mr. Brewer's condition misses the point. The relevant mitigating quality of Mr. Brewer's mental illness is not that it may be dormant at times in the future, or that it might be effectively treated in the future with some combination of medication and/or therapy. The relevant mitigating quality of Mr. Brewer's mental disorder is that a reasonable juror could have found that it made him *less culpable* for murdering Robert Laminack. Just as in *Penry*, the second special issue provided no vehicle through which the jury could express its response to the mitigating force of Mr.

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[18] Although the CCA made no mention of the purported "treatability" of Mr. Brewer's mental impairment in rejecting his *Penry* claim on direct appeal, any such ground of decision would have been objectively unreasonable under 28 U.S.C. §2254(d) for the reasons just stated in text.

Brewer's mental impairment with respect to his moral culpability for the crime.

The Fifth Circuit has described many different types of evidence as having mitigating relevance to the former second special issue. That conclusion has consistently been reached by *a priori* reasoning that treats large classes of evidence as categorically non-problematic under *Penry*. *See, e.g., Robertson v. Cockrell*, 325 F.3d 243, 249-51 (5th Cir. 2003) (*en banc*) (citing numerous cases denying *Penry* claims based on "many different types of mitigating evidence," including "subnormal intelligence," "troubled or abused childhood," "head injury," and "mental illness").[19] The Fifth Circuit has invoked these classifications as the bases for reflexive threshold judgments that obviate the need to explain how the particular evidence in a given case could reasonably have been understood to support a finding of non-dangerousness. This is exactly the kind of foreshortened analysis this Court condemned in *Tennard*, because it derails the analysis called for by *Penry* and *Boyde*: an examination of whether there was a reasonable likelihood, in light of everything that happened at trial, that meaningful consideration was precluded.

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[19] Judge Higginbotham expressed concern about this mechanistic approach to *Penry*. *See Robertson*, 325 F.3d at 258-59 (Higginbotham, J., concurring) (cautioning against "categorical characterization of evidence of disabilities as transient or permanent," and calling it "judicial hubris" to "pronounce as a matter of law that even the most severe child abuse creates only a transient condition," a rule that "would be the result of neither logic nor law" because child abuse manifests itself with "myriad levels of intensity" and affects "victims with myriad degrees of vulnerability"). He added that Texas had "wisely" solved the problem by "mov[ing] to the common sense solution of asking the jury . . . whether, considering all the mitigating evidence, death should be imposed.").

This Court's recent decision in *Ayers v. Belmontes* models the analysis necessary to determine whether jurors were precluded from giving mitigating effect to a defendant's evidence under their penalty-phase instructions. Eschewing any categorical rules, the Court took care to attend to the challenged instruction in the context of all guidance given to the jury by counsel and the court. *See, e.g., Belmontes*, 127 S. Ct. at 475-77 (examining in detail the closing arguments of counsel and the defendant's allocution); *id.* at 477-79 (reviewing the instructions from the court to assess whether jurors would have "fairly read the limitation in the instruction to apply to [the defendant's] central mitigation theory"); *id.* at 479-80 (considering whether questions from jurors during deliberations indicated confusion about their understanding of their sentencing task).

Moreover, the Court in *Belmontes* gave thoughtful consideration to the evidence presented and whether jurors would have been able both to perceive its intuitive connection to the defendant's deserts and express that judgment in their verdict. *Belmontes*, 127 S. Ct. at 473-74 (describing evidence in detail), *id.* at 475 (jury would have understood defendant's mitigation theory as "analogous to the good-character evidence . . . in *Boyde*" and thus within the purview of the California statute's "catch-all" factor), *id.* at 476 (jurors could not have believed their instructions precluded consideration of the defendant's good-character evidence without also perceiving the hearing as an exercise in futility), *id.* at 477 (counsel's argument "would have left the jury believing it could and should contemplate [the defendant's] potential" for self-transformation). In sum, this Court upheld Belmontes' death sentence only after completing a careful exegesis of his trial which convinced it that his jurors appreciated the scope of their power to give effect to his claimed mitigating circumstances. By contrast, the Fifth Circuit

rejected Mr. Brewer's *Penry* claim without any serious examination of his mitigating evidence or how it was presented in the context of his trial. That failure demands reversal under *Penry*, *Johnson*, *Tennard*, and *Smith* alike.

C. THE STATE COURT DECISION REJECTING MR. BREWER'S *PENRY* CLAIM WAS OBJECTIVELY UNREASONABLE.

As we have noted, the Fifth Circuit never examined the CCA's assessment of Mr. Brewer's *Penry* claim; it simply conducted its own analysis – an incorrect one – in reversing the District Court's grant of sentencing relief. Properly examined, the CCA decision is deeply flawed, "objectively unreasonable,"[20] in two respects. It imposes the same "severity" and "nexus" limitations on *Penry* that *Tennard* found indefensible. *See* Section C.1, *infra*. And its conclusion constitutes an unreasonable application of *Penry* to the record of Mr. Brewer's trial. *See* Section C.2, *infra*.

Evaluating both of these aspects of the CCA's decision begins with identifying the rule of "clearly established Federal law, as determined by [this] Court" that it was obliged to apply. 28 U.S.C. §2254(d). Namely, capital sentencing instructions must give jurors a "meaningful basis to consider the relevant mitigating qualities" of the defendant's evidence. *Johnson*, 509 U.S. at 369. *See also Graham*, 506 U.S. at 475 (the special issues must give the jury a "reliable means of giving mitigating effect to th[e] evidence").[21]

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[20] *Williams*, 529 U.S. at 409 (Justice O'Connor speaking for the Court on this point).

[21] Accepting that Mr. Brewer's mitigating evidence was beyond the jury's effective reach under the former special issues does not compel

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1. The CCA's decision was objectively unreasonable because it rested on a theory of mitigation that was baseless under *Penry*, *Johnson*, and *Graham*, and that this Court declared untenable in *Tennard*.

Explaining how the CCA has distorted this straightforward constitutional rule in a series of cases leading up to Mr. Brewer's will require extended discussion. That is because the CCA's opinions often fail to make clear whether it is using its "nexus" and "severity" concepts as threshold screening tests before applying any *Penry* analysis or whether it is intruding them into the *Penry* analysis proper. One thing is clear: the CCA has never explained how the mitigating qualities of evidence like Mr. Brewer's – evidence of an abused childhood and of mental impairment resulting from emotional instability – could be given meaningful effect by a jury in answering either the "deliberateness" or the "future dangerousness" special issues. Yet the CCA almost invariably rejects *Penry* claims based on comparable evidence because, in its view, such evidence fails to show a condition which has both the requisite severity and nexus to the crime to be simultaneously within *Penry* and beyond the two special issues.

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the conclusion that the former scheme was unconstitutional as applied in most or even many cases. Many frequently encountered varieties of mitigating evidence – *e.g.*, remorse; youth; advanced age; evidence of general good character prior to the crime; evidence of religious devotion; a relatively minor role in the offense; positive adaptation to prison; evidence of success in a structured environment such as the workplace, school or the military – generally would receive meaningful consideration through the jurors' assessment of whether the defendant posed a continuing threat to society.

The CCA opinion addressing Mr. Brewer's *Penry* claim on direct appeal,[22] first described his mitigating evidence:

> 1) [Mr. Brewer] was not mentally retarded, but was involuntarily committed on January 1, 1990, for "major depression, single episode, without psychotic features, polysubstance abuse." The examining physician based his opinion on a suicide note [Mr. Brewer] wrote to his mother. On January 25, [Mr. Brewer] signed a request for voluntary admission to Big Springs State Hospital for fourteen days.
>
> 2) [Mr. Brewer] came from an abused background where he was ignored by both his father and step-father. He did not have a relationship or live with his real father until after he was fifteen years old. [Mr. Brewer's] father hit him on several occasions, once with the butt of a pistol and once with a flashlight. [Mr. Brewer's] father frequently beat his mother. [Mr. Brewer's] father had once told him, "If you ever draw your hand back, you'd better kill me because I'll kill you."
>
> 3) [Mr. Brewer] had smoked marijuana when he was a teenager.

JA 140.

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[22] This opinion provides the only explanation by a state court of why *Penry* relief was denied in Mr. Brewer's case. When Mr. Brewer raised the same claim in state post-conviction proceedings, the trial court pronounced – and the CCA adopted – a one-sentence ruling embracing the direct appeal result as the law of the case ("The . . . special issues . . . were an adequate vehicle for the jury's consideration of the mitigating evidence. . . ."). *See* JA 176, 178; *see also, e.g., Ex parte Drake*, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994) (claims litigated on direct appeal are generally not cognizable on habeas corpus); *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984) (declining to address a contention that was rejected on direct appeal).

The CCA then stated without further elaboration that the future dangerousness issue was "an adequate vehicle for the jurors to give effect to [Mr. Brewer's] mitigating evidence." JA 141. It noted that it had previously held that "a stay in a mental hospital does not evidence a 'long term mental illness which would affect [one's] ability to conform to the requirements of society.'" *Id.* (quoting *Joiner v. State*, 825 S.W.2d 701, 707 (Tex. Crim. App. 1992)). It further stated that Mr. Brewer's "evidence of drug abuse and an abusive homelife [sic] was given effect within the scope of the punishment issues." *Id.* (footnotes omitted) (citing *Ex parte Ellis*, 810 S.W.2d 208, 211-12 (Tex. Crim. App. 1991)), and *Goss v. State*, 826 S.W.2d 162, 166 (Tex. Crim. App. 1992). It offered no explanation for how jurors might have viewed those circumstances as logically supporting a "no" answer to either of the special issues.

In emphasizing that Mr. Brewer was "not mentally retarded," and suffered no "long term mental illness" preventing him from "conform[ing] to the requirements of society," the CCA delivered a pre-emptive strike against Mr. Brewer's *Penry* claim. It did not examine the trial record to consider whether, under all the circumstances of this case, jurors would have felt themselves precluded from considering the mitigating qualities of Mr. Brewer's abused childhood and mental impairment. Instead, the CCA foreclosed any such inquiry with its finding that Mr. Brewer's mental impairment was insufficiently severe to implicate *Penry*.[23] That rationale cannot survive *Tennard*.

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[23] Tellingly, the CCA first notes that Mr. Brewer "was not mentally retarded." The CCA decision which this Court criticized in *Tennard* likewise assumed that only mental retardation could implicate *Penry*. *See Ex parte Tennard*, 960 S.W.2d 57, 61 (Tex. Crim. App. 1997) (assuming that *Penry* would apply only if "the evidence of [Tennard's]

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Nor did the CCA explain the rest of its holding, that Mr. Brewer's mitigating evidence of suffering violent physical abuse at his father's hands as an adolescent likewise "was given effect within the scope of the punishment issues." None of the three decisions cited in support of the CCA's bald assertion that the jury was able to give effect to Mr. Brewer's mitigating evidence – *Joiner*, *Ellis*, and *Goss* – articulates any rationale supporting that conclusion. In each case, the CCA simply observes that the evidence reflected impairment less severe than Penry's, and/or lacked a causal "nexus" to the crime,[24] and then states that under such circumstances, the jury could give effect to the evidence in answering the

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low IQ somehow falls within *Penry I*'s definition of mental retardation"). This Court as much as held that such a view of *Penry* would be objectively unreasonable, and the Fifth Circuit subsequently agreed. *Tennard*, 542 U.S. at 288 (Tennard's *Penry* claim was legitimate because the relationship between the former special issues and his low IQ "ha[d] the same essential features" as the relationship between those issues and Penry's evidence); *see also Tennard v. Dretke*, 442 F.3d 240, 255 (5th Cir. 2006) (opinion on remand) (acknowledging that "the Supreme Court has never indicated that only . . . mental retardation mitigates" against a potential death sentence).

[24] *See Joiner*, 825 S.W.2d at 707 (Joiner offered "no testimony concerning [his] mental or emotional condition *at the time of the offense*") (emphasis added); *see also Goss*, 826 S.W.2d at 165 ("mitigating evidence is relevant to [sentence] if there is a nexus between the mitigating evidence and . . . the crime," which means "the evidence must tend to excuse or explain the criminal act. . . .") (citations omitted). *Goss* adds a footnote citing *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings* with a "*But cf.*" signal, suggesting an awareness that this Court's cases supported no such limitation. *See Goss*, 826 S.W.2d at 165 n.2. The same attitude toward the authority of this Court's precedents was on display in the CCA's more recent decision in *Ex parte Smith*, 132 S.W.3d 407 (Tex. Crim. App. 2004), which this Court found warranted summary reversal. *See Smith*, 132 S.W.3d at 422 n.2 (Hervey, J., concurring) (asserting that jurors would have understood their power to "nullify" their honest answers to the special issues, and footnoting this Court's contrary decision in *Penry II* with a "but see" signal).

former special issues.[25] It never ventures an explanation of how a juror might have reasoned from the respective defendants' mental impairments to a "no" answer to the future dangerousness question.

Although the CCA's opinions themselves certainly make the point clearly enough, Respondent has already represented to this Court that the CCA developed and applied "severity" and "nexus" tests in the *Penry* context that "paralleled" the Fifth Circuit screening tests struck down in *Tennard*. *See* Brief of Respondent, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002) at 22-28 and accompanying notes (describing how the CCA developed an elaborate jurisprudence limiting *Penry* to cases involving "continuing, long-term, or permanent" conditions that were "sufficiently severe" to be comparable to Penry's own and which possessed a "connection between the [mitigating evidence] and the commission of the crime"). Respondent cited both *Joiner* and *Goss* as examples of the CCA's approach. Respondent thus has already recognized that the CCA was following the same approach in Mr. Brewer's case as the Fifth Circuit followed prior to *Tennard* – and which this Court has resoundingly rejected.

Deciding whether a defendant's mitigating evidence is relevant beyond the scope of the "deliberateness" and

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[25] *Joiner*, like *Brewer*, simply asserts that the future dangerousness question provided the jury with a vehicle with which to give effect to the evidence that Joiner had been hospitalized for emotional problems and threatening suicide shortly before the crime. *Joiner*, 825 S.W.2d at 707 (citing *Ellis*). Although *Ellis* states that mitigating evidence other than mental retardation and child abuse might raise a *Penry* claim, it observes that because the defendant's suicide attempt, drug problem, and low academic achievement did not "rise to the level" of Penry's own impairments, the statutory special issues permitted the jury to consider that evidence and give it effect. *Ellis*, 810 S.W.2d at 212.

"dangerousness" issues, *see Penry*, 492 U.S. at 321-22, requires a reviewing court to consider whether that evidence could be given meaningful effect within the facially narrow special issues "in the light of all that has taken place at the trial," *Boyde*, 494 U.S. at 381; *see also Tennard*, 542 U.S. at 288-89. But the CCA has instead applied broad categorical rules that made such contextual analysis unnecessary. It has defined mitigating evidence by reference to the now-discredited "severity" and "nexus" tests and then assumed that any evidence not "constitutionally relevant" or not "relevant beyond the scope of the special issues" *according to that definition* must have been within the jurors' effective reach in answering the special issues. That is why the CCA in Mr. Brewer's case never reached the point of undertaking the *Penry* analysis which *Boyde* and *Tennard* require – an explanation of why or how Mr. Brewer's history of child abuse and psychological impairment as a young adult could have been given meaningful consideration under the "deliberateness" and "future dangerousness" questions.[26]

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[26] The CCA's analysis, to be sure, is confusing and inconsistent. Sometimes the CCA's "nexus" and "severity" tests appear identical to the Fifth Circuit's, *i.e.*, rigid threshold tests of constitutional relevance that foreclose further *Penry* analysis. *See, e.g., Goss*. At other points, the CCA seems to cite its "nexus" and "severity" requirements as a sort of shorthand for its understanding of what kind of evidence would raise *Penry* problems under the former special issues. But in the latter case, even when the CCA mouths what looks like the right question (*i.e.*, can this evidence be given effect within the special issues?), it conducts no analysis beyond asking whether the evidence is substantially identical to Penry's. *See, e.g., Ellis*. In *Tennard*, for example, the CCA ultimately asserted that "[t]here was ample room within special issue two for the jury to give effect to any mitigating qualities of [Tennard's] low IQ evidence." *Tennard*, 960 S.W.2d at 63. But as this Court later recognized, that outcome turned on what the CCA perceived as the categorical distinction between mental retardation and other types of mental

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In *Tennard*, this Court flatly rejected the use of identical limitations on the definition of "constitutionally relevant mitigating evidence" as a substitute for conducting a case-specific review of the relationship between a particular defendant's mitigating evidence and the special issues, with due regard for the full context of the trial.[27] Just as those criteria were unreasonable when imposed by the Fifth Circuit as threshold bars to *Penry* relief, they were no less unreasonable when articulated and imposed by the CCA to the same end.[28]

This Court need not labor to disentangle the CCA's application of its "severity" and "nexus" conditions in Mr. Brewer's case from the CCA's unexplained assertion that "the second punishment issue provided an adequate vehicle for the jurors to give effect to [Mr. Brewer's] mitigating evidence." Where such misstatements of the law are woven into the framework for a state court decision, that decision as a whole is objectively unreasonable under 28 U.S.C. §2254(d). *Williams v. Taylor*, 529 U.S.

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impairment, rather than on the relationship between Tennard's evidence and the special issues in the full context of his trial. *See id.* at 60-61 (addressing in detail, under the sub-heading "Mental Retardation," why the evidence of Tennard's 67 IQ did not mean that he was mentally retarded and hence within *Penry*'s scope); *see Tennard*, 542 U.S. at 288-89 (modeling the correct approach).

[27] *Tennard*'s dismissal of the nexus and severity tests as having "no foundation in the decisions of this Court," 542 U.S. at 284, compels the conclusion that it is "objectively unreasonable" to treat them, as the CCA has, as defining the scope of *Penry*.

[28] The CCA consistently applied its threshold "nexus" and "severity" criteria to *Penry* claims from 1991 right up until this Court's decision in *Tennard*. The last case in which it did so was its initial opinion in the Laroyce Smith litigation, which this Court then summarily reversed in the wake of *Tennard*. *Ex parte Smith*, 132 S.W.3d 407 (Tex. Crim. App. 2004), *rev'd*, *Smith v. Texas*, 543 U.S. 37 (2004).

362, 414 (2000) (where the state court had erroneously identified *Lockhart v. Fretwell*, 506 U.S. 364 (1993), rather than *Strickland v. Washington*, 466 U.S. 668 (1984), as stating the test for "prejudice" resulting from ineffective assistance of counsel, this Court treated that decision as an unreasonable application of clearly established Federal law in part because "[i]t is impossible to determine . . . the extent to which the [state court's] error . . . affected its ultimate finding [of] no prejudice").

2. The CCA's reasoning aside, the result it reached was objectively unreasonable because the jury lacked a "meaningful basis to consider the relevant mitigating qualities" of Mr. Brewer's mitigating evidence in answering the special issue questions.

Even putting aside the objectively unreasonable analysis underlying the CCA's rejection of Mr. Brewer's *Penry* claim, this Court cannot endorse the conclusion that the jury could give meaningful mitigating effect to Mr. Brewer's history of childhood abuse and mental impairment in answering the future dangerousness issue. When the CCA rejected Mr. Brewer's *Penry* claim in 1994, the "clearly established Federal law" relevant to his claim consisted primarily of *Jurek v. Texas*, 428 U.S. 262 (1976), *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (plurality opinion), *Penry*, *Graham*, and *Johnson*. *Penry* pointed unambiguously to the result Mr. Brewer urged, and nothing in *Jurek*, *Franklin*, *Graham* or *Johnson* should have changed that result. Simply put, it was objectively unreasonable for the CCA to find *Penry* relief foreclosed for Mr. Brewer when he was, in principle, indistinguishably situated from Penry himself.

Penry held that mitigating evidence of mental retardation and childhood abuse could not be given meaningful mitigating consideration by a jury limited to assessing the defendant's "deliberateness" and "future dangerousness," because such evidence lacked a straightforward mitigating relevance to those issues. 492 U.S. at 328. Unlike the mitigating evidence presented in *Jurek* (relative youth, good work history, and aid to his family) or *Franklin* (the defendant's clean prison disciplinary record), the circumstances of Penry's background could well have been given *aggravating* effect under the future dangerousness issue. *Id.* at 323-24. And although those factors bore some mitigating relevance to the "deliberateness" question, *id.* at 322, their primary mitigating relevance in reducing Penry's moral culpability was not reliably captured by their logical relevance to whether he was capable of "deliberate" conduct as that term is commonly understood. Accordingly, this Court held that some instruction beyond the "deliberateness" and "dangerousness" issues was required.

The second case that could have informed the CCA's evaluation of Mr. Brewer's *Penry* claim was *Graham*. But for the reasons explained in Section B *supra*, *Graham* cannot save the CCA's decision. Graham offered background evidence to highlight his positive character traits and emphasize his prospects for rehabilitation. The thrust of Mr. Brewer's case in mitigation, by contrast, was that he had spent his adolescence in a violent home environment in which he was subjected to physical abuse by his father and forced to witness the physical mistreatment of his mother, and that very shortly before the crime he was so tormented by mental illness that he threatened to take his own life and was committed to a mental hospital, where he fell under the spell of the woman who would lead him into killing Mr. Laminack. In short, the mitigating

evidence here, unlike in *Graham*, tried to offer an *explanation* for Mr. Brewer's violent behavior.

Graham nowhere purported to modify *Penry*'s firm holding that jurors could give no meaningful effect to evidence of mental impairment or "harsh physical abuse" under the former special issues. Accordingly, if the CCA in 1994 thought *Graham* required it to deny *Penry* relief to Mr. Brewer, that conclusion was objectively unreasonable.

The final potentially relevant precedent, *Johnson*, concerned exclusively whether Johnson's mitigating evidence of youth *simpliciter* received meaningful consideration under the former Texas special issues. *Johnson*, 509 U.S. at 367 ("The question presented [is] whether the Texas special issues allowed adequate consideration of petitioner's youth"). Thus, the Court was obliged to decide whether *Penry*'s reasoning extended to evidence of a defendant's youthful age, without more. (Johnson was nineteen at the time of his crime). Embracing parts of the analysis in *Graham*, the Court concluded that because "the relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient," the future dangerousness question could afford it meaningful consideration. *Id.* at 368.

Johnson had presented very little other background evidence. *See Johnson*, 509 U.S. at 356-57. That evidence indicated that Johnson had been a regular churchgoer as a child, that his mother died and his sister was murdered during his adolescence, that he was negatively influenced by bad friends and illegal drugs, and that he was remorseful for his crimes. *Id.* Given that the Court had granted review to decide solely whether youth could be given effect as mitigating under the former Texas special issues, it is not surprising that the Court did not address separately

whether Johnson's other mitigating evidence required an additional instruction beyond the "deliberateness" and "future dangerousness" issues. Had it done so, the Court surely would have found that those aspects of Johnson's background were within the jurors' effective reach due to their nature and how they were presented at trial.

First, like Graham and unlike Mr. Brewer, Johnson aimed his mitigating evidence directly at the "future dangerousness" question. *See Johnson*, 509 U.S. at 369 (Johnson's lawyer urged the jury to regard any negative consequences of Johnson's background as imminently "subject to change," and thus "readily comprehended as a mitigating factor in consideration of the second special issue"). Further, and again unlike Mr. Brewer, Johnson did not object to the standard special issue questions as inadequate to permit consideration of his evidence, nor offer alternative instructions to broaden the scope of the jury's inquiry into Johnson's personal culpability. *Id.* at 355 (Johnson made "no request that a more expansive instruction be given concerning any particular mitigating circumstance . . . "); *id.* at 358 (same). Because Johnson explicitly directed his mitigating presentation to portraying himself as a teenager likely soon to mature into a non-dangerous adult – a prediction bolstered by evidence of prior good character and remorse for the crime – this Court concluded that the future dangerousness issue gave the jury a meaningful vehicle for responding to that evidence.

The nature of Johnson's mitigating evidence and the manner in which it was presented at his trial linked the evidence in a direct, commonsensical fashion to non-dangerousness, allowing this Court to conclude under *Boyde* that no reasonable likelihood existed that Johnson's jurors would have felt themselves precluded from giving

effect to his evidence in answering the second special issue. Johnson's counsel determinedly argued the mitigating relevance of Johnson's evidence to the "future dangerousness" inquiry, and the prosecution neither disavowed nor disputed that connection. The "signature qualities" of the key feature of Johnson's mitigating evidence, his youth, were inevitably transient, giving them unique relevance to an assessment of his future dangerousness. *Johnson*, 509 U.S. at 368. None of these factors supporting the result in *Johnson* (and in *Graham*) under *Boyde* are present here.

Perhaps most important, *Johnson* expressly reaffirmed *Penry*'s core holding. *Johnson*, 509 U.S. at 369 ("*Penry* remains the law and must be given a fair reading"). It cast no doubt on the insufficiency of the special issues as applied to mitigating evidence sharing the same essential features as Penry's mental impairment and child abuse. For that reason, if the CCA interpreted *Johnson* as a license to deny *Penry* relief in Mr. Brewer's case, it was objectively unreasonable in doing so.[29]

This court's decisions since *Graham* and *Johnson* are consistent in treating those opinions as not disturbing the core holding of *Penry*. Both *Penry II* and *Smith* rest on the principle that the jury's sentencing instructions must not exclude from meaningful consideration the "relevant

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[29] This Court held numerous petitions for writ of certiorari from death-sentenced Texas prisoners pending *Johnson*. Although it denied most of them in *Johnson*'s wake, it also issued "GVR" orders in a number of cases, indicating the seriousness of its intent that the CCA enforce a "fair reading" of *Penry*. *See, e.g., Lucas v. Texas*, 509 U.S. 918 (1993); *Mines v. Texas*, 510 U.S. 802 (1993); *Granviel v. Texas*, 509 U.S. 917 (1993); *Earhart v. Texas*, 509 U.S. 917 (1993); *Richardson v Texas*, 509 U.S. 917 (1993); *Zimmerman v. Texas*, 510 U.S. 938 (1993).

mitigating qualities" of the defendant's evidence. Regardless of the precise terms in which the test is framed, its central requirement is that the jury must have a "reliable means for giving mitigating effect to [the defendant's] evidence." *Graham*, 506 U.S. at 475. In the context of this case, Mr. Brewer's jury had no such "reliable means" for expressing the conclusion that a sentence less than death was the appropriate punishment for a defendant with a history of child abuse and mental impairment. Neither the CCA nor the Fifth Circuit articulated any explanation of how those mitigating factors could be linked to "non-dangerousness" in a way that would make the "future dangerousness" question a sensible, direct way to give effect to their relevant mitigating qualities – because no such way exists.

The result in *Penry* turned on how Penry's mitigating evidence related to the special issues, rather than on any unique abstract quality of that evidence itself. *See, e.g. Tennard*, 542 U.S. at 288 (finding that the relationship between Tennard's low IQ and the former special issues had the "same essential features" as those found to require relief in *Penry*). *Penry* held that the relevant mitigating qualities of a defendant's childhood deprivation – of abuse, mistreatment, abandonment, neglect, and the like – could not be meaningfully addressed via the special issues. Nothing in *Graham* or *Johnson* retreated from that clear holding with respect to evidence of the destructive impact of such experiences. Given that Mr. Brewer's abused childhood and mental illness shared the same relevant mitigating qualities as Penry's abused childhood and mental retardation, it was objectively unreasonable for the CCA to reach a different outcome in Mr. Brewer's case than this Court reached in *Penry*.

3. Recognizing the CCA's decision in Mr. Brewer's case as objectively unreasonable does no violence to this Court's decisions giving the States wide latitude to guide how a capital jury considers mitigating evidence.

Just as in *Penry*, *Penry II*, *Tennard*, and *Smith*, nothing about Mr. Brewer's claim challenges *Jurek*, which sustained the former Texas capital sentencing statute against facial attack. *See Penry*, 492 U.S. at 315 (distinguishing the "as applied" challenge in *Penry* from the facial challenge turned aside in *Jurek*); *cf. Graham*, 506 U.S. at 474 (*Penry* did not "effect[] a sea change" in the Court's view of the constitutionality of the former Texas scheme). Unlike the petitioner in *Johnson*, Mr. Brewer seeks no requirement that every Texas jury "be instructed in a manner that leaves it free to depart from the special issues in every case." *Johnson*, 509 U.S. at 373. Accepting that Mr. Brewer's mitigating evidence of an abused childhood and mental impairment was not within the jury's "effective reach" under the former special issues does not compel the inference that the former scheme was generally unconstitutional as applied. *See* n. 21 *supra*. It simply recognizes that where, as here, a defendant's mitigating evidence bears no straightforward or commonsensical relationship to non-dangerousness, *and* the prosecutor has attempted to exploit the facial narrowness of the former issues and bind jurors to answering them solely on the basis of the evidence, without regard to their consequences for the penalty to be imposed, the special issues give jurors "no reliable means of giving mitigating effect to that evidence." *Graham*, 506 U.S. at 475.

Thus, Mr. Brewer's argument is in every particular consistent with the Court's recognition that States may structure the consideration of mitigating evidence in order

to achieve a more rational administration of the death penalty. The rule Mr. Brewer seeks here acknowledges the "simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Johnson*, 509 U.S. at 372-73 (citing *Saffle v. Parks*, 494 U.S. 484, 490 (1990)). Mr. Brewer's claim raises no question about the continuing vitality of the mechanisms States may employ to ensure that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Those practices, including anti-sympathy instructions, *California v. Brown*, 479 U.S. 538, 542 (1987); exclusion of evidence relating to issues conclusively resolved at the guilt phase, *Oregon v. Guzek*, ___ U.S.___, 126 S. Ct. 1226, 1231 (2006); placement of the burden of proof as to the weight of mitigation, *Kansas v. Marsh*, ___ U.S.___, 126 S. Ct. 2516 (2006); assignment of the burden of proof as to the existence of mitigation, *Walton v. Arizona*, 497 U.S. 639, 649 (1990); restricting jurors' authority to weigh factors in aggravation where no mitigation exists, *Blystone v. Pennsylvania*, 494 U.S. 299, 306-07 (1990); and others, are unaffected by straightforward enforcement of a fair reading of *Penry*.

The problem with the view of *Penry* shared by the CCA and the Fifth Circuit has become ever clearer as those courts have ignored the successive guidance provided by *Penry II*, *Tennard* and *Smith*. This problem is that both courts persist in declaring that broad categories of mitigating evidence could be given meaningful effect by jurors limited to answering the former Texas special issues

– and they both repeat and endlessly expand those categorical declarations without ever explaining what plausible, sensible connection the evidence in any particular case might bear to the terms of the "deliberateness" and "future dangerousness" issues. At most, the Fifth Circuit and the CCA have occasionally offered counterintuitive, *post hoc* rationalizations which occurred to no one at trial, in an attempt to suggest that jurors might have taken an equally strained view of the evidence. But that approach ignores the fact that evidence like Mr. Brewer's lacks any logical connection to either special issue except that it strongly, affirmatively suggests that the defendant would pose a continuing threat to society – exactly as the prosecutor argued at Mr. Brewer's sentencing trial. In short, the CCA and the Fifth Circuit have veered far from the course set by *Penry*, because they treat broad swaths of mitigating factors as addressable through the special issues but never undertake the analysis necessary to demonstrate that, in a given case, the jurors actually had a meaningful opportunity to consider and give effect to the relevant mitigating qualities of the condemned defendant's evidence.

CONCLUSION

The Fifth Circuit wrongly reversed the District Court's thoughtful opinion granting Mr. Brewer relief in light of *Tennard*. The Circuit's own opinion cannot be squared with *Tennard*, and it completely ignores that the CCA's decision rejecting Mr. Brewer's *Penry* claim did so by applying the same "nexus" and "severity" requirements for *Penry* relief that *Tennard* has declared completely baseless. Mr. Brewer's mitigating evidence bore no relationship to either of the two pre-1991 Texas special issues

that were submitted to the jury as the sole determiners of his sentence. Furthermore, the prosecutor deliberately exploited the facial narrowness of the special issues by insisting that Mr. Brewer's jurors answer them solely on the basis of the evidence, without regard to their consequences for the penalty to be imposed. Under these circumstances, the CCA applied *Penry* in an objectively unreasonable manner in finding that the jury had any meaningful way under its instructions to respond to the relevant mitigating qualities of Mr. Brewer's abused childhood and psychological problems as a young adult.

Mr. Brewer's death sentence violates *Penry*. This Court should reverse the Fifth Circuit and instruct it to reinstate the judgment of the District Court granting habeas corpus relief.

Respectfully submitted,

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No. 05-11287

DEC 9

In The
Supreme Court of the United States

BRENT RAY BREWER,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Was Brewer's mitigating evidence of a troubled adolescence and a single psychiatric hospitalization for drug abuse and depression sufficiently within the jury's effective reach when it answered the pre-1991 Texas capital-sentencing special issues, which required the jury to determine whether the defendant's murderous conduct was deliberate and whether there was a probability he would commit further acts of criminal violence?

2. Did this Court's opinions in *Penry v. Johnson,* 532 U.S. 782 (2001), and *Smith v. Texas,* 543 U.S. 37 (2004), overrule *Jurek v. Texas,* 428 U.S. 262 (1976), *Graham v. Collins,* 506 U.S. 461 (1993), and *Johnson v. Texas,* 509 U.S. 350 (1993), and their Fifth Circuit progeny, which held that most types of mitigating evidence will find sufficient effect within the former special issues?

3. Does the lower court's holding—that treatable mental problems are within the effective reach of a sentencing jury in answering the pre-1991 special issues—impermissibly resurrect the threshold test for "constitutional relevance" that this Court rejected in *Tennard v. Dretke,* 542 U.S. 274 (2004)?

4. When the prosecution implored jurors to "follow the law" and "do their duty" in answering the former Texas special issues, is there "a reasonable probability that the jury has applied the . . . [special-issue] instructions in a way that prevents the consideration of constitutionally relevant evidence," *Boyde v. California,* 494 U.S. 370, 380 (1990)?

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This Court should affirm the lower court's judgment denying habeas corpus relief. The Court of Criminal Appeals of Texas identified the correct federal authority—divined from this Court's opinions as of January 2001—and reasonably applied it to Petitioner Brent Ray Brewer's[1] claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), during direct appeal and state habeas corpus proceedings. Moreover, assuming *arguendo* the state court decision was unreasonable, Brewer fails to demonstrate a reasonable likelihood that his sentencing jury was unable to give sufficient mitigating effect to his evidence of a difficult adolescence—in which he fought violently with his father on several occasions—and a single psychiatric hospitalization for drug abuse and depression—during which he met his co-defendant and girlfriend—in answering the former Texas special issues. This evidence was presented by defense counsel in order to show the jury that Brewer's violent tendencies were influenced by his father and girlfriend and, if sentenced to life imprisonment, he would not be exposed to such bad influences and would remain pacific. There is no possibility Brewer's jury, armed with a commonsense understanding of its ability to exercise reasoned moral judgment in answering the future-dangerousness question, would have been precluded from giving constitutionally-sufficient effect to his mitigating evidence. Nothing in this Court's opinions in *Smith v. Texas*, 543 U.S. 37 (2004), *Tennard v.*

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[1] Respondent Nathaniel Quarterman will be referred to herein as "the Director." "JA" refers to the Joint Appendix, followed by page numbers. "RR" refers to the Reporter's Record of transcribed trial proceedings, preceded by volume number and followed by page numbers. "DX" refer to the numbered exhibits offered by the defense and admitted into evidence at trial.

Dretke, 542 U.S. 274 (2004), or *Penry v. Johnson,* 532 U.S. 782 (2001) (*Penry II*), dictates a different result. As a result, habeas corpus relief is not available to Brewer.

STATEMENT OF THE CASE

I. Facts of the Crime

The Court of Criminal Appeals of Texas succinctly summarized the evidence proving Brewer's guilt in its direct appeal opinion:

> The evidence adduced at trial shows that on April 26, 1990[, Brewer] and Kristie Lynn Nystrom convinced the deceased to give them a ride in his truck. [Brewer] rode in the back seat. After traveling approximately one block, [Brewer] stabbed the deceased several times in the neck while Nystrom held the deceased's right arm to prevent him from fighting back. The deceased's jeans were pulled down over his buttocks and a blood transfer stain from his wallet was found on his underwear. Nystrom was later seen with the deceased's blood-soaked wallet and truck keys. Further, [Brewer] stated to Skee Callan [*sic*] that he had killed a man for $140—the same amount of money that the deceased was believed to have at the time of his death. Michelle Francis, [Brewer]'s and Nystrom's roommate, testified that neither [Brewer] nor Nystrom had any money earlier that day. However, both were later able to purchase bus tickets to Dallas.

JA:124 (*Brewer v. State,* No. 71,307 (Tex. Crim. App. 1994) (unpublished opinion)).

In addition, an FBI forensic serologist determined that DNA from blood found on the steering wheel of the victim's truck was consistent with Brewer's DNA. 16 RR 342-60. More importantly, a bloodstained butterfly knife was found just outside the front passenger door of the victim's truck. 15 RR 24, 81, 135-38, 167, 170-71. DNA from blood found on the knife matched both Brewer and the victim. 16 RR 359-60. An FBI fingerprint expert also determined that Brewer's fingerprints and palm print were found on the right rear outside door handle as well as the right rear door frame of the victim's truck. 16 RR 400-03, 419-20. Brewer's bloody fingerprint was also found on the butterfly knife. 16 RR 408-09. Brewer was seen after the murders with a cut on his hand. 16 RR 433-34, 440-41; 17 RR 456-57. Finally, both Brewer and Nystrom were seen soaked with blood the night of the murder. 16 RR 433-35; 17 RR 454-55.

II. Facts Relating to Punishment

Brewer's father, Albert, and his mother, Karon, separated before Brewer was born. JA:44. Albert first saw his son when he was five months old, while on a thirty-day leave before reporting for military duty in Vietnam. *Id.* at 45. Albert did not see Brewer again until a funeral four years later. *Id.* By this time, Brewer's mother had divorced Albert and was remarried to Don Bartlett. *Id.* at 45-46, 64. Brewer's stepfather "treated him really well" at first, but in later years payed more attention to Brewer's half-sister, Billie Ann Bartlett. *Id.* at 65-66. Brewer performed well in school until he had back surgery in the fifth grade; nonetheless, he was a starting player for his championship football and basketball teams, played baseball, and was

popular with his classmates. *Id.* at 66. During junior high school, however, Brewer began to abuse marijuana. *Id.*

Kathleen Bailey, the former assistant principal of Brewer's middle school in Cedar Hill, Texas, testified that Brewer was sent to an alternative school on more than one occasion for threatening another child with a knife and for other violent, injurious behavior. 18 RR 637-38, 640-42, 644. Bailey also indicated that Brewer's intelligence quotient (IQ) was 115. *Id.* at 652.

Brewer saw his father again at age fifteen. JA:46, 63. Sometime after this, Albert and Karon remarried and moved the family to Hamilton, Mississippi. *Id.* at 47-48. Amy Forrester, who dated Brewer at Hamilton High School in 1988, testified that eighteen-year-old Brewer picked her up and shoved her against the edge of a metal locker. 18 RR 592-96, 602. Forrester, who weighed only 108 pounds, sustained nerve damage that paralyzed her right arm for nearly two years as a result. *Id.* at 596-97, 609. Brewer also threatened to hurt her and kill her new boyfriend. *Id.* at 597. Cecil Beasley, the former principal of Hamilton High School, observed Forrester and Brewer arguing in the hallway at school on a different occasion. *Id.* at 611, 620. Brewer was very angry, struck a locker with his fist, and threatened to kill Forrester. *Id.* at 611-13, 622. Beasley noted Brewer had anger management problems, but could control his temper when he made an effort. *Id.* at 633-34.

Albert admitted that he verbally and physically abused Brewer and his mother during the time they lived together in Mississippi, a fact Karon confirmed. JA:49-50, 65. Albert struck Brewer on separate occasions with the butt of a pistol, a flashlight, and his fist. *Id.* at 65. Albert

related that he once threatened to kill Brewer when Brewer attempted to break up a fight between his mother and father. *Id.* at 50. Albert also testified that he was an alcoholic, recovering heroin addict, and suffered from posttraumatic stress disorder. *Id.* at 47, 52-53.

Deputy sheriff Richard Lepicier testified for the State that he responded to a domestic disturbance call at Brewer's Mississippi home in 1989. JA:6-7. Brewer's father was hospitalized after nineteen-year-old Brewer broke up an argument between his parents by brutally assaulting Albert with a broom handle. *Id.* at 7-9. Dr. Walter Echman, a neurosurgeon in Tupelo, Mississippi, testified that he treated Albert Brewer for multiple facial fractures and a compound, depressed skull fracture which lacerated his brain, damaging his speech abilities and right-side motor function. *Id.* at 22-26. Brewer moved away while Albert was recovering in the hospital. *Id.* at 57-58.

Police officer Ronald Mosher testified that, in 1989, he twice encountered Brewer in Naples, Florida during the early morning hours in a neighborhood known for drug activity. 18 RR 658-60. On one occasion, Brewer was arrested for carrying a concealed knife with a seven-inch blade. *Id.* at 660-61.

Brewer called Howard County Justice of the Peace China Long to testify that, in 1990, she signed an order committing Brewer to Big Spring State Hospital for psychiatric treatment. JA:32-35; DX 5. Brewer's family sought the commitment order because of a suicide note. JA:39. After fourteen days, Brewer voluntarily requested that his treatment be extended. *Id.* at 35. It was during his stay in this rehabilitation facility that Brewer met his co-defendant, Kristie Nystrom, a twenty-two-year-old

topless dancer. *Id.* at 71-72, 74-75. According to his mother and other witnesses, Nystrom had undue influence over Brewer and caused him to abandon his plans to stop using marijuana and crack and to "help other kids get off of drugs." *Id.* at 71-72; 18 RR 798, 815-16, 838.

A significant portion of Brewer's punishment case consisted of a residual doubt defense presented through the testimony of friends Carol Burks, DeDe Bishop, and Michelle Francis. Each witness, in turn, implicated either Nystrom or a third person known only as "James." 18 RR 798, 809-10, 812-13. However, the State called fellow county jail inmate Kevin Lewis, who overheard Brewer claim that he stabbed a man who begged, "Please, boy, don't kill me. Please, boy, don't kill me." *Id.* at 710-11. Lewis also testified Brewer threatened to stab Lewis in the eye with a pencil during a card game. *Id.* at 706-07.

Neither the State nor the defense presented expert testimony from a mental health professional who evaluated Brewer. The State called Dr. Richard Coons, a psychiatrist, who testified based on a hypothetical fact pattern that there was a probability that Brewer would commit criminal acts of violence that would represent a continuing danger to society, including prison society. 18 RR 728-32. Dr. Randall Price, a clinical psychologist, testified for the defense that such hypothetical opinions on future dangerousness were unreliable and, in fact, were wrong two-thirds of the time. 18 RR 839, 843-44. The only expert opinion in evidence was the cursory diagnosis made as a prerequisite to commitment proceedings: "major

depression, single episode, without psychotic features, polysubstance abuse."[2] JA:35, 37; DX 5.

The jury was then charged with answering the two special issues submitted in all Texas capital prosecutions prior to 1991. JA:88-93, 120-21; *see also* TEX. CODE CRIM. PROC. Art. 37.071(b) (West 1989). The "deliberateness" special issue asked if "the conduct of the defendant . . . that caused the death of the deceased . . . was committed deliberately and with the reasonable expectation that the death of the deceased would result?" JA:120. "Deliberately" was defined as "a manner of doing an act characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences; willful, slow, unhurried, and steady as though allowing time for a decision." *Id.* at 90. The "future dangerousness" special issue queried the jury whether there was "a probability that the defendant . . . would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* at 121.

During closing argument, defense counsel stressed Brewer's lack of felony convictions and violent behavior as an adult. JA:103-04, 111-12. Counsel discounted much of the State's future-dangerousness evidence as "little-boy stuff" and youthful indiscretion. *Id.* at 104-06. Brewer's attorney also explained that "[l]ife in prison will make sure that [Brewer] will not be around wom[e]n that can influence him; will not be around fathers that can hurt him and beat him and influence him. Life in prison will get him away." *Id.* at 106. In response, the State argued

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[2] As the Court of Criminal Appeals of Texas later noted, Brewer "chose not to enter the records from Big Spring State Hospital into evidence." JA:140 n.10.

that Brewer was a dangerous, cold-blooded predator and that, even if imprisoned for life, "someone else will get hurt." *Id.* at 117-18. On June 1, 1991, the jury answered both special issues "yes" and the trial court assessed a sentence of death. *Id.* at 120-21.

III. Direct Appeal and Postconviction Proceedings in State Court

On direct appeal, the Court of Criminal Appeals applied the appropriate Supreme Court authority available in 1994 to determine "whether the [deliberateness and future-dangerousness] issues provided a vehicle for the jury to give effect to [Brewer's mitigating] evidence." JA:137-41 (citing *Penry I, Franklin v. Lynaugh,* 487 U.S. 164 (1988) (plurality opinion), *Eddings v. Oklahoma,* 455 U.S. 104 (1982), *Lockett v. Ohio,* 438 U.S. 586 (1978) (plurality opinion), and *Jurek v. Texas,* 428 U.S. 262 (1976) (plurality opinion)).

The state court first summarized Brewer's three categories of mitigating evidence: (1) he was committed and later voluntarily admitted to Big Spring State Hospital for "major depression, single episode, without psychotic features, polysubstance abuse" based on a suicide note he wrote to his mother; (2) he came from an abused background and did not have a relationship or live with his real father until after he was fifteen-years old; and (3) he smoked marijuana as a teenager. JA:140. The state court concluded that the future-dangerousness special issue provided an adequate vehicle for the jurors to give effect to Brewer's mitigating evidence. *Id.* at 141. This Court denied certiorari review concerning Brewer's *Penry I* claim. *Brewer v. Texas,* 514 U.S. 1020 (1995).

Brewer's habeas corpus application in state court was denied—based, *inter alia,* on the trial court's conclusion that the sentencing special issues "were an adequate vehicle for the jury's consideration of [Brewer's] mitigating evidence"—on January 31, 2001.[3] JA:172-78 (*Ex parte Brewer,* 50 S.W.3d 492 (Tex. Crim. App. 2001) (*per curiam* order)). This Court declined to review Brewer's *Penry I* claim for a second time on October 9, 2001. *Brewer v. Texas,* 534 U.S. 955 (2001).

IV. Federal Habeas Corpus Proceedings

Brewer filed a habeas corpus petition in the federal district court on May 7, 2001 and, ultimately, after the district court requested additional briefing concerning *Tennard,* relief was partially granted on August 2, 2004. JA:1-2, 186-96 (*Brewer v. Dretke,* No. 2:01-CV-112-J, 2004 WL 1732312, *1-5 (N.D. Tex. 2004) (unpublished order)). The Director appealed and a panel of the United States Court of Appeals for the Fifth Circuit unanimously reversed, holding that the state court correctly determined Brewer's mitigating evidence was *not* beyond the effective reach of the jury when it answered the former Texas special issues. *Id.* at 3-5, 214-29 (*Brewer v. Dretke,* 442 F.3d 273 (5th Cir. 2006)).

The court of appeals first noted that, "although some relevant evidence may receive constitutionally insufficient

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[3] Brewer's initial attempt to obtain postconviction relief occurred in federal district court, where he unsuccessfully requested federal funding to exhaust his state court remedies. After the federal courts declined to intervene, the proceedings were dismissed without prejudice. *Brewer v. Johnson,* No. 96-11188 (5th Cir. 1996) (unpublished order); *Brewer v. Scott,* No. 2:95-CV-125 (N.D. Tex. 1997) (same); *Brewer v. Johnson,* 139 F.3d 491 (5th Cir. 1998).

mitigating effect under the standard Texas special issues (*e.g.*, evidence of mental retardation), other evidence is quite capable of being given mitigating effect through that methodology." JA:221. "For the mitigating evidence to be within the effective reach of the jury in answering the special issues, the special interrogatories must be capable of giving relevant evidence constitutionally sufficient mitigating effect." *Id.* at 222. "To determine whether a jury has sufficient vehicles for considering mitigating evidence, the habeas court must determine whether 'there is no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of the [mitigating evidence].'" *Id.* at 223 (quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).

The lower court held that Brewer's "evidence of one hospitalization for a single episode of non-psychotic major depression" was not beyond the reach of the jury because it was not "chronic and/or immutable." JA:224-25 (citing *Bigby v. Dretke*, 402 F.3d 551, 571 (5th Cir.) (holding Bigby's "chronic and severe" schizophrenia, which "cannot be adequately controlled or treated," made him unable "to conform his behavior" or "avoid criminal behavior" and, thus, was beyond the scope of the special issues), *cert. denied*, 126 S. Ct. 239 (2005)). The court of appeals also held that Brewer's evidence of a "troubled childhood may, as a result of its temporary character, fall sufficiently within the ambit of the special dangerousness instruction." *Id.* at 223-24 n.16 (citing *Graham v. Collins*, 506 U.S. 461, 475-76 (1993)). Finally, the court below explained that "a jury can adequately incorporate evidence of short-term mental illness and substance abuse into its decision calculus." *Id.* at 228.

The lower court denied panel rehearing on March 1, 2006[4] and *en banc* rehearing on December 27, 2006. JA:214; *see* Appendix to Brief of Respondent (Appendix). This Court granted a writ of certiorari to review Brewer's *Penry I* claim—the third time the claim was raised in this Court—on October 13, 2006. *Id.* at 230 (*Brewer v. Quarterman*, 127 S. Ct. 433 (2006)).

SUMMARY OF THE ARGUMENT

The court below properly denied federal habeas corpus relief because the state court did not unreasonably apply clearly-established federal law as of 1994 and 2001 each time it denied state postconviction relief to Brewer. This well-established Supreme Court precedent demands a case-by-case inquiry into whether the sentencing jury was able to give sufficient effect to a defendant's mitigating evidence in answering the former Texas special issues concerning deliberateness and future dangerousness. Moreover, this Court has made it abundantly clear that almost all types of mitigating evidence may be sufficiently considered under the special issue scheme and that *Penry I* is the notable exception to the rule. This is true even where mitigating evidence—such as Brewer's evidence of a troubled adolescence and a single psychiatric hospitalization for drug abuse and depression—may have some arguable relevance outside the special issues as well. All the Eighth Amendment requires is that a jury be able to consider Brewer's mitigating evidence *in some manner.*

[4] On this date, the court of appeals withdrew its earlier opinion, *Brewer v. Dretke*, 410 F.3d 773 (5th Cir. 2005), and substituted the current opinion in its place. JA:214.

There is no principled distinction between Brewer's evidence of a troubled and violent relationship with his father late in adolescence and the evidence of a difficult childhood considered by this Court in *Graham*. There is also no meaningful similarity between Brewer's teenage troubles and the severe abuse and deprivation which occurred in *Penry I*. Similarly, Brewer's single episode of depression does not bear any real resemblance to the permanent mental retardation and brain damage in *Penry I*. Indeed, Brewer had an IQ of 115. In any event, the jury heard testimony and argument that Brewer would not be dangerous if sentenced to life imprisonment. Thus, his mitigating evidence had no *aggravating* relevance within the future-dangerousness special issue. In short, the relationship between the special issues and Brewer's mitigating evidence completely lacks the same essential features as the relationship between the special issues and evidence such as mental retardation or low IQ. Any contrary holding would make *Penry I* the rule rather than the exception. As a result, the lower court's judgment should be affirmed.

ARGUMENT

I. Standard of Review

This proceeding is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which states in relevant part that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West 2006).

This Court has held that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court case, yet reaches an opposite result. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Here, where the state court correctly identified the controlling Supreme Court precedent, the unreasonable application test of § 2254(d)(1) applies. *Id.* at 406-08. A state court "unreasonably applies" clearly established federal law if it recognizes the governing precedent but unreasonably applies it to the facts of a particular case. *Id.* at 407-09.

A federal habeas court's inquiry into reasonableness should be objective rather than subjective, and a court should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams*, 529 U.S. at 409-11. Rather, federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable, "whether or not [this Court] would reach

the same conclusion." *Id.* at 411; *Woodford v. Visciotti,* 537 U.S. 19, 27 (2002). As this Court explained:

> [T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations.

Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). Here, where the state court applied the broad Eighth Amendment rule of *Penry I* to the unique mitigating evidence in Brewer's case, that court's judgment is entitled to maximum leeway under the AEDPA.

Finally, it is the state court's ultimate decision denying relief that is to be tested for unreasonableness, not its reasoning. *Saiz v. Ortiz,* 392 F.3d 1166, 1176 (10th Cir. 2004), *cert. denied,* 125 S. Ct. 2976 (2005); *Wright v. Dep't of Corr.,* 278 F.3d 1245, 1255 (11th Cir. 2002); *Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir. 2001); *Cruz v. Miller,* 255 F.3d 77, 86 (2d Cir. 2001); *Long v. Humphrey,* 184 F.3d 758, 760-61 (8th Cir. 1999); *Matteo v. Superintendent,* 171 F.3d 877, 891 (3d Cir. 1999) (*en banc*); *see also Neal v. Puckett,* 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*) (holding that a federal court's "focus on the 'unreasonable application' test under section 2254(d) should be on the ultimate legal conclusion that the state court reached and

not on whether the state court considered and discussed every angle of the evidence").

II. *Penry I* and Its Progeny Demand a Case-by-Case Inquiry into the Mitigating Significance of the Evidence Presented and Whether the Jury Was Able to Give Sufficient Effect to That Evidence Within the Scope of the Special Issues.

In *Penry I,* this Court was forced to reconcile its plurality opinions in *Woodson v. North Carolina,* 428 U.S. 280, 303-04 (1976) (which requires that a capital-sentencing authority be allowed to consider mitigating circumstances), *Jurek,* 428 U.S. at 276 (explaining that the pre-1991 Texas special issues—deliberateness and future dangerousness—allowed Texas juries to consider mitigating circumstances), and the unique, double-edged mitigating circumstances presented in *Penry I* itself (mental retardation, brain damage, and severe child abuse). 492 U.S. at 320-25. The resultant decision was a carefully crafted and, ultimately, case-specific compromise. Indeed, the successor cases in this Court have demonstrated one crucial principle: *Penry I* remains the rare exception to the general rule of *Jurek.*

A. *Jurek* to *Penry I* to *Johnson*: almost all types of mitigating evidence may be sufficiently considered in answering the former Texas special issues.

At the root of *Penry I* are found the competing interests involved in capital sentencing: the requirement for an individualized determination of moral culpability based on both aggravating and mitigating factors, and the need to

adequately guide and channel a jury's consideration of these factors. The *Woodson* line of cases first construed the Eighth Amendment to require that a capital-sentencing jury not be precluded *as a matter of law* from consideration, as a mitigating factor, of the character and record of the individual offender, as well as the circumstances of the particular offense. *Eddings v. Oklahoma,* 455 U.S. 104, 111-12 (1982); *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion); *Woodson,* 428 U.S. at 303-04.

As the Court explained, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry I,* 492 U.S. at 319 (quoting *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). However, not all evidence presented as mitigating must be considered as such. *Franklin v. Lynaugh,* 487 U.S. 164, 174 (1988) (plurality opinion); *Skipper v. South Carolina,* 476 U.S. 1, 7 n.2 (1986). Nor is it constitutionally required that consideration of mitigating evidence be structured or balanced in any particular way. *Buchanan v. Angelone,* 522 U.S. 269, 276-77 (1998); *Franklin,* 487 U.S. at 179; *Booth v. Maryland,* 482 U.S. 496, 502 (1987), *overruled on other grounds, Payne v. Tennessee,* 501 U.S. 808 (1991); *Zant v. Stephens,* 462 U.S. 862, 875-76 (1983).

Prior to the development of the rule in *Eddings,* the *Jurek* plurality held that the Texas special issues were constitutional because "the enumerated questions allow consideration of particularized mitigating factors," *e.g.,* a defendant's criminal record (or lack thereof), the range of severity of such a record, his youth, the circumstances of

the crime, duress and mental or emotional disturbance, and remorse. 428 U.S. at 272-73. Jurek's mitigating evidence of good character, youth, and intoxication was sufficiently within the ambit of the future-dangerousness special issue to satisfy the "individualized sentencing determination" required by *Woodson*. *Id.* at 271-73. And, in *Franklin*, the Court first recognized that the special issues were constitutionally sufficient even where the mitigating evidence had relevance to culpability apart from the concerns embodied in the deliberateness and future-dangerousness questions. 487 U.S. at 177-82. The Court specifically rejected the notion that the forward-looking future-dangerousness inquiry was inadequate for the consideration of backward-looking character evidence. *Id.* at 177-78; *cf. id.* at 189-90 (arguing that good-character evidence was *not* within the scope of the future-dangerousness issue because it might have relevance to past culpability rather than future conduct) (Stevens, J., dissenting). Commonsense dictates that the individualized-determination doctrine of *Lockett* and *Eddings* must yield to the requirement that a capital-sentencing jury receive guidance in its decision-making at some point. Otherwise, *Jurek* is without meaning. As the Court explained:

> *Lockett* does not hold that the State has no role in structuring or giving shape to the jury's consideration of these mitigating factors. Given the awesome power that a sentencing jury must exercise in a capital case, it may be advisable for a State to provide the jury with some framework for discharging these responsibilities.

Franklin, 487 U.S. at 179 (citation omitted).

Thereafter, the *Penry I* Court held that the Texas special issues, as applied to Penry, did *not* allow consideration of his specific evidence of mental retardation, brain damage, and severe child abuse. 492 U.S. at 322. This was because the evidence, which suggested that Penry was "less able . . . to control his impulses or to evaluate the consequences of his conduct," did not necessarily suggest that his murderous actions were less than deliberate. *Id.* Additionally, Penry's evidence indicated that he was unable to "learn from his mistakes," and was relevant to the future-dangerousness special issue *only* as an *aggravating* factor. *Id.* at 323. Thus, neither special issue provided a vehicle for the jury to give mitigating effect to Penry's "two-edged" evidence. *Id.* at 324. Yet the Court specifically noted that its *Penry I* opinion did *not* negate the facial validity of the Texas special issues, nor did it change the fact that other types of mitigating evidence *could* be considered under the plain language of the special issues. *Id.* at 315-19. For more than a decade *Penry I* would be viewed as the narrow exception to *Jurek*.

During its next term, the Court acknowledged the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde v. California,* 494 U.S. 370, 380 (1990). Accuracy is important, but finality equally so. *Id.* Indeed, "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Id.* at 380-81. As a result, the Court crafted a legal standard for reviewing ambiguous jury instructions that relies not on subjective and hypothetical hairsplitting but on objective and reasonable analysis. *Id.* at 378-81. The Court held that a *mere possibility* that the jury was precluded from considering relevant mitigating

evidence did *not* establish Eighth Amendment error. *Id.* at 380. Rather, such error occurred only if there was a "reasonable likelihood" that the jury applied its instructions in a way that prevented the consideration of such evidence. *Id.*; *see also Saffle v. Parks,* 494 U.S. 484, 490-92 (1990) (no Eighth Amendment error where there is no indication that the jury was "altogether prevented" from giving some effect to the evidence).

The Court would continue to endorse *Jurek* and limit the application of *Penry I* where the mitigating evidence presented was not *solely aggravating* when viewed through the lens of the special issues. For example, in *Graham,* the Court declined to "read *Penry* [*I*] to effect a sea change in the Court's view of the constitutionality of the . . . Texas death penalty statute."[5] 506 U.S. at 474. As in *Franklin,* the Court found that future dangerousness was a constitutionally adequate vehicle for the consideration of his mitigating evidence of youth, troubled upbringing, and good character.[6] *Graham,* 506 U.S. at 475. This

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[5] Brewer avers that *Penry I* was not at issue in *Graham* because it merely applied the retroactivity doctrine of *Teague v. Lane,* 489 U.S. 288 (1989), in order to determine the state of the law in 1984, presumably when Graham's sentence became final. Petitioner's Brief (Brief) at 25 & n.13. This is nonsense. In *Penry I,* the Court held that relief was dictated by *Lockett* and *Eddings,* decided in 1978 and 1982, respectively. 492 U.S. at 318-19. *Graham* decided that *Lockett* and *Eddings* did not dictate relief *on the facts of Graham's case,* and that *Penry I* was distinguishable *on its facts.* 506 U.S. at 472-77.

[6] Brewer also asserts that "*Graham* did not involve evidence of a 'troubled childhood.'" Brief at 25-26. Yet the four dissenting justices clearly believed it did, but employed the term "difficult upbringing" instead. *Graham,* 506 U.S. at 520 (Souter, J., dissenting). The two phrases are undoubtedly synonymous. Indeed, the Fifth Circuit had previously described it as "difficult childhood." *Graham v. Collins,* 950

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was because the "mitigating significance" of Graham's evidence did not *compel* affirmative answers to the special issues as did Penry's evidence, but instead suggested that Graham would *not* be a future danger. *Id.* at 475-76.

Thus, as in *Boyde,* the possibility that mitigating evidence might have "*some* arguable relevance beyond the special issues" was immaterial as long as the jury was able to give effect to the evidence in some meaningful way. *Id.* at 476 (emphasis in original). Indeed, "virtually *any* mitigating evidence" can be characterized as relevant to culpability but outside the scope of the Texas special issues. *Id.* (emphasis in original). In his dissent, Justice Souter ably demonstrated how to do so. *Id.* at 518-21 (suggesting youth and difficult upbringing, *i.e.*, "his mother's mental illness and repeated hospitalization, and his shifting custody to one family relation or another" had mitigating relevance outside or aggravating relevance within the future-dangerousness question). But if this idea was followed to its logical conclusion, the Court noted, *Penry I* would have swallowed *Jurek* completely. *Id.* at 476-77. Such reasoning is inconsistent with *Jurek* and *Franklin.*

In *Johnson,* the Court again rejected the notion that a jury could ever view youth "as outside its effective reach in answering the [future-dangerousness] special issue." 509 U.S. at 368. This is so even if youth could also be viewed as aggravating; constitutional error results only if the evidence is unavoidably aggravating within the context of the special issues. *Id.* at 368-69. Again, the Court specifically rejected

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F.2d 1009, 1013 (5th Cir. 1992) (*en banc*) (quoting *Graham v. Collins,* 896 F.2d 893, 897 (5th Cir. 1990)).

the notion that mitigating evidence must be allowed relevance in every way imaginable during sentencing. The Court explained that general "personal culpability" is, by its nature, intertwined with the notion of future dangerousness. *Id.* at 369-70. This is because "a Texas capital jury deliberating over the Special Issues is *aware of the consequences* of its answers," and is understood to "exercise a range of judgment and discretion" and basic "commonsense" in answering those issues. *Id.* at 370 (quoting *Adams v. Texas,* 448 U.S. 38, 46 (1980), and citing *Boyde,* 494 U.S. at 381, and *Franklin,* 487 U.S. at 182 n.12) (emphasis added); *cf. Blystone v. Pennsylvania,* 494 U.S. 299, 322 (1990) ("by focusing on the deliberateness of the defendant's actions and his future dangerousness, the [Texas capital sentencing] questions compel the jury to make a *moral judgment* about the severity of the crime and the defendant's *culpability*") (Brennan, J., dissenting) (emphasis added).

Further, as the Court explained, any contrary understanding would necessarily overrule *Jurek* and "entail an alteration of the rule of *Lockett* and *Eddings.*" *Johnson,* 509 U.S. at 372. "Instead of requiring that a jury be able to consider *in some manner* all of a defendant's relevant mitigating evidence, the rule would require that a jury be able to give effect to mitigating evidence *in every conceivable manner* in which the evidence might be relevant." *Id.* (emphasis added). This would constitutionally require the jury "be instructed in a manner that leaves it free to depart from the special issues in every case" and effectively deprive the states of the prerogative "to structure the consideration of mitigating evidence, *id.* at 373, overruling *Furman v. Georgia,* 408 U.S. 238 (1972), and *Gregg v. Georgia,* 428 U.S. 153 (1976), as well. The Court specifically rejected the converse "full effect" argument

advanced by Justice O'Connor in dissent. *Id.* at 375-76, 379-87.

In 1994 and again in early 2001, when the state court decided Brewer's *Penry I* claim, this Court had been silent on the *Penry I* issue for quite some time. Notably, however, the Court continued to endorse *Jurek* and *Johnson*. *See, e.g., Ayers v. Belmontes,* 127 S. Ct. 469, 480 (2006); *Tuilaepa v. California,* 512 U.S. 967, 972-75 (1994); *Buchanan,* 522 U.S. at 276-77. Thus, a state court ascertaining clearly-established federal law would have understood the following. Pursuant to *Jurek,* the former Texas special issues were facially constitutional. Yet *Lockett* and *Eddings* require that a jury not be prevented from making an individualized sentencing decision based on the available mitigating evidence. Although *Penry I* held that diminished capacity evidence of a defendant's inability to learn from his mistakes might have only aggravating relevance to future dangerousness and, thereby, lead to a violation of the Eighth Amendment rule of *Eddings,* the Texas special issues remained constitutionally sufficient so long as the defendant's evidence could find *some* mitigating relevance to culpability within the special issues, regardless of whether it might have aggravating relevance as well. There existed a presumption of constitutionality under most circumstances, even where the defendant could characterize—and re-characterize as necessary throughout successive appeals—the mitigating evidence as beyond the effective reach of the jury. This is because a Texas jury was presumed to understand the consequences of its actions and the moral judgment required.

The net result was that few types of mitigating evidence would have only aggravating relevance within the special issues and lead to *Penry I* error.

B. *Penry II* did not alter the Court's *Jurek/Penry I/Johnson* jurisprudence, nor did it justify a change in perception among the lower courts.

In June 2001, the Court revisited *Penry I* to decide whether a supplemental instruction given during Penry's retrial—an instruction not at issue here—"complied with [the Court's] mandate in *Penry I*." *Penry II*, 532 U.S. at 786. The Court first reiterated its holding in *Penry I*—that the mitigating evidence presented at Penry's 1980 trial was "relevant only as an *aggravating* factor" to the special issues—and explained that Penry was retried in 1990, where "the defense again put on extensive evidence regarding Penry's mental impairments and childhood abuse." *Id.* at 787-88. The Court then considered whether the Texas court had "unreasonably applied" *Penry I* by its endorsement of the supplemental instruction. *Id.* at 796-804.

The Court recognized "two possible ways" to interpret the supplemental instruction. First, the instruction "had no practical effect" because it merely told "the jurors to take Penry's mitigating evidence into account in determining their truthful answers to each special issue." *Penry II*, 532 U.S. at 798. Alternatively, it rendered the jury charge "internally contradictory" because the jury was also instructed that a "yes" answer to a special issue was appropriate only where supported by evidence proved beyond a reasonable doubt and a "no" answer was called for only when there was a reasonable doubt. *Id.* at 799. The supplemental instruction directed the jury to "change one or more truthful 'yes' answers to an untruthful 'no' answer in order to avoid a death sentence." *Id.* But "jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to

violate their oath to render a 'true verdict,'" creating "a reasonable likelihood that the jury applied the challenged instruction in a way that prevented the consideration of Penry's mental retardation and childhood abuse." *Id.*

Thus, neither of the two possible views of the supplemental instruction cured the error recognized in *Penry I*. The first left the jury in the same position as before, with no way to give effect to mitigating evidence that was only relevant to the special issues in an *aggravating* way. Conversely, the second advised the jury to render a false verdict because Penry's evidence was not relevant to the special issues in any *mitigating* way. However, both arguments rest on the same foundation: that Penry's evidence of mental retardation, brain damage, and severe child abuse was beyond the scope of the special issues. In essence, the supplemental instruction did not *create* new error; rather, the instruction simply *failed to correct* the error identified in *Penry I* because, during Penry's retrial, the jury was again faced with mitigating evidence that compelled affirmative answers to the special issues and created a likelihood that the jury was unable to ethically assess a life sentence if it so chose.

Although the "full effect" language of Justice O'Connor's *Johnson* dissent surfaced in the *Penry II* majority opinion, 532 U.S. at 797, it had nothing to do with the supplemental-instruction issue because the *Penry I* Court had already reached the conclusion that Penry's mitigating evidence could not be given sufficient effect within the special issues. There is certainly no possibility a reasonable state court jurist would have assumed the *Penry II* majority turned the tables on the Court's prior opinion in *Johnson*, in which the Court specifically declined to adopt such a standard.

Although this Court approved of the "clearly drafted catchall instruction on mitigating evidence" that was adopted by Texas in 1991, it is important to note that the Court avoided holding any such instruction was *necessary*. *Penry II*, 532 U.S. at 803 (citing TEX. CODE CRIM. PROC. Art. 37.071(2)(e)(1) (West 1991)); *Belmontes*, 127 S. Ct. at 480; *Blystone*, 494 U.S. at 305. Such a decision would have overruled *Jurek*, *Franklin*, *Graham*, and *Johnson*, which recognized that states are free to structure capital-sentencing schemes as they see fit, within certain reasonable parameters. *See Franklin*, 487 U.S. at 179 ("[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required"). The very idea that a catchall instruction is *not* constitutionally necessary implies that most kinds of mitigating evidence do not require special accommodation under *Penry I*. Brewer's evidence is no different.

C. *Tennard*, *Smith*, and the new standard of constitutional relevance

In the wake of *Penry II*, the floodgates seemingly opened. After eight years of silence, the Court granted certiorari in six *Penry* cases in five years.[7] In *Tennard*, the

[7] During this same time period, however, the Court *denied* certiorari in several *Penry* cases in which the evidence was not dissimilar to Brewer's. *See, e.g.*, *Newton v. Dretke*, 371 F.3d 250, 256-57 (5th Cir.) (mitigating evidence of difficult upbringing within the scope of the special issues), *cert. denied*, 543 U.S. 964 (2004); *Robertson v. Cockrell*, 325 F.3d 243, 245-46 (5th Cir.) (*en banc*) (childhood abuse at the hands of his alcoholic father as well as drug abuse), *cert. denied*, 539 U.S. 979 (2003); *Harris v. Cockrell*, 313 F.3d 238, 242 (5th Cir. 2002) (alcoholism), *cert. denied*, 540 U.S. 1218 (2004); *Hernandez v. Johnson*, 248 F.3d 344, 349 (5th Cir.) (treatable, chronic schizophrenia), *cert. denied*, 534

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Court confronted a *Penry I* claim based on an IQ score of sixty-seven. 542 U.S. at 277. In adjudicating the claim, the lower court applied its "constitutional relevance" test,[8] developed during the nine-year interim since *Graham* and *Johnson*. *Tennard*, 542 U.S. at 281, 283-84. But this Court reversed, holding that constitutional relevance was an "improper legal standard" with "no basis in [Supreme Court] precedents," and that the correct standard to be applied was *only* whether the evidence was within the effective reach of the jury in answering the special issues. *Id.* at 287-88. Without actually determining that Tennard's low IQ was beyond the scope of the special issues, the Court merely remanded for further review. *Id.* at 288-89. The Court did not adopt or endorse the "full effect" language mentioned in *Penry II* and Justice O'Connor's *Johnson* dissent. Nor did the Court even mention *Jurek* or *Johnson*, much less overrule those precedents.

In essence, the *Tennard* Court chastised the Fifth Circuit for invoking "its own restrictive gloss on *Penry I*"—constitutional relevance—as a screening test. *Tennard*, 542 U.S. at 283. The Court explained that:

> [T]he "meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other

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U.S. 1043 (2001). "[W]hile it is inappropriate to ascribe undue significance to denials of certiorari," this Court has certainly sent mixed signals to the court below in recent years. *See Robertson*, 325 F.3d at 256-57 & nn.21-24 (collecting cases in which certiorari was denied).

[8] "To be constitutionally relevant, the evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, . . . and (2) that the criminal act was attributable to this severe permanent condition." *Tennard v. Cockrell*, 284 F.3d 491, 595 (5th Cir. 2002) (internal quotations omitted).

> context, and thus the general evidentiary standard—"any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"—applies.

Id. at 284 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)). "Once this low threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence." *Id.* at 285 (quotations and citations omitted).

Although the Court noted that "gravity" has a place in the *Penry I* calculus "insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability," it is clear that most types of mitigating evidence will meet the *Tennard* relevance standard. 542 U.S. at 286 (citation omitted). The Director assumes for the sake of argument that Brewer's mitigating evidence of childhood mistreatment and a single psychiatric hospitalization is relevant within the meaning of *Tennard*. As previously noted in the Director's brief in opposition to certiorari review, Brewer's evidence that his girlfriend was the dominant partner in their relationship is *not* constitutionally relevant, because it is "unlikely to have any tendency to mitigate [his] culpability." *Tennard*, 542 U.S. at 286.

The Court's opinion in *Smith v. Texas* the next term noted its ruling in *Tennard* but focused on an entirely different issue: a supplemental instruction similar to the one addressed in *Penry II*. As in *Penry II*, this instruction "did not provide the jury with an adequate vehicle for expressing a 'reasoned moral response' to all of the evidence relevant to the defendant's culpability." *Smith*, 543

U.S. at 45-48 (quoting *Penry II,* 532 U.S. at 796). Importantly, no *Penry II* instruction was submitted in the instant case. In this sense, *Smith* and *Penry II* are not directly on point.

In addition, the *Smith* Court reiterated its disapproval of the constitutional-relevance standard rejected in *Tennard. Smith,* 543 U.S. at 45. The state court in *Smith* had adopted that standard for the first time only two months prior to the issuance of *Tennard. Smith,* 543 U.S. at 43-45; *see also Ex parte Smith,* 132 S.W.3d 407, 413-14 (Tex. Crim. App. 2004) (citing *Robertson,* 325 F.3d at 251, and *Graham,* 950 F.2d at 1029). Of course, that standard was not employed by the court below. Beyond that, the *Smith* Court did not adjudicate the issue of whether Smith's evidence was beyond the effective reach of the jury in answering the former Texas special issues. Thus, *Smith* adds little to the *Jurek/Penry I/Johnson* story other than to reinforce the tangential opinions in *Penry II* and *Tennard.*

D. The current state of *Penry I* jurisprudence

When *Jurek, Penry I,* and the litany of cases that follow in the wake of those opinions are viewed as a whole, the following Eighth Amendment inquiry may be gleaned: a court must determine (1) whether the mitigating evidence has met the "low threshold for relevance" established in *Tennard* and, if so, (2) whether the evidence was within the effective reach of the jury in answering the special issues. 542 U.S. at 284-85; *Coble v. Dretke,* 444 F.3d 345, 358 (5th Cir. 2006); *Bigby,* 402 F.3d at 564-65; *Madden v. Collins,* 18 F.3d 304, 308 (5th Cir. 1994). As the court below explained, "[f]or the mitigating evidence to be

within the effective reach of the jury in answering the special issues, the special interrogatories must be capable of giving relevant evidence constitutionally sufficient mitigating effect." JA:222; *Cole v. Dretke,* 418 F.3d 494, 499 (5th Cir. 2005), *cert. granted sub nom. Abdul-Kabir v. Quarterman,* 127 S. Ct. 432 (2006); *see also Tennard v. Dretke,* 442 F.3d 240, 257 (5th Cir. 2006) ("The key inquiry . . . is whether the jury could give sufficient *mitigating* effect to Tennard's evidence") (opinion on remand) (emphasis in original); *Bigby,* 402 F.3d at 564 (special issues must confer sufficient discretion on the sentencing body to consider the character and record of the individual offender); *Graham,* 506 U.S. at 468 (same). Of course, this objective inquiry is subject to the deferential standard of 28 U.S.C. § 2254(d)(1). *Tennard,* 542 U.S. at 288-89; *Coble,* 444 F.3d at 349-50; *Tennard,* 442 F.3d at 254.

As discussed above, this Court has recognized that, in most cases, the former special issues remain constitutional because they "allow consideration of particularized mitigating factors." *Jurek,* 428 U.S. at 272-73. The fact that mitigating evidence might have "*some* arguable relevance beyond the special issues" is immaterial because "virtually *any* mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' apart from its relevance to the particular concerns embodied in the Texas special issues." *Graham,* 506 U.S. at 476 (citing *Franklin,* 487 U.S. at 190 (Stevens, J., dissenting)) (emphasis in *Graham*). To demonstrate Eighth Amendment error, there must exist more than "the mere possibility" that the jury was prevented from giving effect to mitigating evidence. *Johnson,* 509 U.S. at 367; *see also Cole,* 418 F.3d at 507 n.54 ("[A] jury can not give mitigating effect to evidence that can be seen as *aggravating*

only") (emphasis in original). Instead, Brewer must show a reasonable likelihood the jury could not consider his mitigating evidence. *Boyde,* 494 U.S. at 380.

It is crucial to reiterate why the reasonable-likelihood standard exists: during repeated appeals brought by successive lawyers over the course of a decade or more, the trial record is embellished, exaggerated, and rehashed so much that what the jury listened to at trial bears no resemblance to the evidence described in a habeas corpus petition. Hyperbole is human nature. However, these subjective tendencies must be quelled in favor of an objective viewpoint if a jury verdict is ever to become final. Put another way, just because Brewer can imagine a way the evidence might be relevant to his culpability outside the scope of the future-dangerousness special issue does not mean that a jury would deem that evidence to be beyond its grasp. This is mere speculation and is forbidden by *Boyde.* 494 U.S. at 380.

III. The Court Below Properly Rejected Brewer's *Penry I* Claim.

When Brewer's mitigating evidence is considered objectively, there is no *reasonable* likelihood the jury was precluded from giving constitutionally sufficient mitigating effect to it in answering the Texas future-dangerousness special issue.[9] Initially, the court below

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[9] Brewer does challenge the lower court' s decision with regard to his mitigating evidence of drug use. Nonetheless, a reasonable jury could easily conclude that Brewer did not act deliberately due to intoxication, or would not be a future danger in prison without access to drugs. *Harris,* 313 F.3d at 242; *James v. Collins,* 987 F.2d 1116, 1121

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correctly held that Brewer's evidence of a troubled childhood was within the purview of future dangerousness especially where, as here, the possibility of rehabilitation was highlighted by the defense. JA:223-27 & n.16 (citing *Graham,* 506 U.S. at 475, *Jacobs v. Scott,* 31 F.3d 1319, 1327 (5th Cir. 1994), and *Cole,* 418 F.3d at 507); JA:102, 106-07; *cf. Clark v. Collins,* 19 F.3d 959, 963 (5th Cir. 1994) (applying *Johnson*—not constitutional relevance—to hold child abuse within the scope of future dangerousness especially where possibility of rehabilitation exists).

The evidence indicates Brewer could not have been physically abused at all until after the age of fifteen, when he first reestablished a relationship with his father. JA:46, 63. To that point, Brewer experienced a reasonably idyllic childhood. Although Brewer's father abandoned the family at an early age, his mother remarried into a seemingly-stable home. *Id.* at 44-46, 64. During this time, Brewer excelled in school and sports and was popular with his classmates. *Id.* at 66. His successes were no doubt due to his high intelligence and stable home life. 18 RR 652. During adolescence, however, Brewer began to dabble in marijuana. JA:66. There is no indication whether this drug use was due to peer pressure or merely boredom, but it is most likely the root cause of the disruptive behavior he began to engage in during middle school/junior high school. 18 RR 637-38, 640-42, 644.

Brewer's life began to become more complicated after 1985, when his mother remarried his father and moved the family to Mississippi. JA:47-48. At this point, the

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(5th Cir. 1993). Thus, such evidence was within the purview of the special issues.

record falls silent for some time. The lone documented physical confrontation between Brewer and his father occurred in 1989, when Brewer was nineteen-years old, and followed closely on the heels of his violent assault on Amy Forrester. JA:6-9; 18 RR 592-96, 602. Although Brewer's father confessed to striking Brewer with various objects,[10] an objective analysis of the evidence suggests that Brewer was routinely the aggressor by this time in his life. JA:65. This aggressive behavior resulted in his father's hospitalization with serious, life-threatening injuries and culminated in murder. JA:22-26.

The late—if detrimental—influence of Brewer's father on his life stands in marked contrast to *Penry I* and *II*, where frequent child abuse and neglect occurred at an early age. *See, e.g., Penry I*, 492 U.S. at 308-10 (expert testimony concerning "beatings and multiple injuries to the brain at an early age," as well as social and emotional deprivation; sibling's testimony that "mother had frequently beaten him over the head with a belt when he was a child," and "routinely locked [him] in his room without access to a toilet for long periods of time"). Moreover, there was no evidence that any of Brewer's unfortunate experiences "in any way impaired his cognitive abilities." JA:215 n.3; *cf. Penry I*, 492 U.S. at 308-09 (Penry's brain damage "resulted in poor impulse control and an inability to learn from experience" or "to appreciate the wrongfulness of his

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[10] Brewer repeatedly refers to evidence of "extensive physical abuse" or "violent abuse." Brief at 3, 9, 37, 42. Yet Brewer's mother reported only three instances and no serious injuries. JA:65. Brewer's father stated that he "threatened him with physical [harm]" and, on at least one occasion, was physically violent. *Id.* at 49-51. It is certainly a stretch to characterize these events as "large in extent, range, or amount." THE AMERICAN HERITAGE COLLEGE DICTIONARY 484 (3d ed. 2000).

conduct or to conform his conduct to the law"). To the contrary, Brewer's high intelligence and proper upbringing would have led the jury to the opposite conclusion. An intelligent individual like Brewer is *objectively* more able to adapt to and overcome hardship, especially when experienced late in adolescence and only briefly. This is just commonsense.

Nevertheless, the evidence was certainly not *aggravating* within the scope of the future-dangerousness issue. There was no testimony that Brewer was unable to control his impulses or learn from his mistakes. *Cf.* 492 U.S. at 322-23 (explaining that it was Penry's lack of impulse control and inability to learn from his mistakes that gave rise to error). Brewer's evidence of childhood troubles—especially the minimal amount of abuse suffered—is, without a doubt, within the scope of future dangerousness when viewed objectively. It is certainly much more akin to the troubled childhood evidence at issue in *Graham* than anything else.

The lower court has rejected Eighth Amendment claims based on very similar evidence of a troubled childhood:

> This [C]ourt . . . has also held that evidence of a defendant's "unstable" and "transient" childhood could be given effect under the special issues. *Jacobs v. Scott*, 31 F.3d [at] 1327 [] (citing *Graham v. Collins*, 506 U.S. 461 []). In *Jacobs*, we distinguished evidence of a troubled childhood offered by the defendant from that in *Penry I*. *Id.* Jacobs argued that:
>
> > evidence was presented showing that Mr. Jacobs had an unstable, troubled childhood. He never knew his mother, and has only vague memories of his father. His father left him to live alone with

> strangers when he was a small boy, and Mr. Jacobs never saw him again. Mr. Jacobs ended up living in several foster homes as a child, separated from his sister, parents, and all other family connections.

Id. Coble had a troubled childhood similar to that of Jacobs and Graham, "as opposed to a childhood rife with harsh physical abuse like that of Penry." *Id.* Coble's evidence of his troubled childhood included: (1) the death of his father before he was born; (2) poverty in childhood; (3) his stepfather's alcoholism and conflicts with his mother; and (4) his mother's nervous breakdown. His evidence of his childhood is more "transient" and "unstable," like the evidence presented in *Jacobs* and *Graham* than it is similar to Penry's evidence of abuse.[11] Coble's evidence is distinguishable from that in *Penry* [*I*].

Coble, 444 F.3d at 362.

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[11] Graham produced evidence of a difficult childhood. As this Court explained:

> we are not convinced that *Penry* could be extended to cover the sorts of mitigating evidence Graham suggests without a wholesale abandonment of *Jurek* and perhaps also of *Franklin v. Lynaugh*. As we have noted, *Jurek* is reasonably read as holding that the circumstance of youth is given constitutionally adequate consideration in deciding the special issues. We see no reason to regard the circumstances of Graham's family background and positive character traits in a different light. Graham's evidence of transient upbringing and otherwise nonviolent character more closely resembles Jurek's evidence of age, employment history, and familial ties than it does Penry's evidence of mental retardation and harsh physical abuse.

Graham, 506 U.S. at 475.

As in *Coble, Jacobs,* and *Graham,* Brewer's childhood troubles—a neglectful and briefly abusive father—were well within the reach of the jury in answering the future-dangerousness special issue. Indeed, it is very likely that the vast majority of death-eligible criminals had such negative childhood experiences. But the overwhelming number of such inmates who were tried prior to 1991 in Texas are not entitled to *Penry I* relief. If this were the case, *Penry I* would cease to be the exception to *Jurek.* Instead, *Jurek* would be the exception to *Penry I.* Thus, it is important to recognize the *exceptional* nature of the mitigating evidence in *Penry I.* 492 U.S. at 308-10. Brewer's case is clearly not so exceptional; rather, it is just a typical death penalty case and Brewer's mitigating evidence does not justify a retrial after fifteen years.

Similarly, the lower court properly reasoned that the evidence Brewer "had a bout with depression three months before the murder" and "was briefly hospitalized for that depression" was well within the scope of the future-dangerousness issue. JA:223-24 & nn.17-18. This can hardly be characterized as a "mental impairment" of the sort discussed in *Penry I.* Brewer's multiple attempts to portray it as such are an irresponsible exaggeration. *See, e.g.,* Brief at 6, 8-9, 11, 14-16, 19, 28 nn.15-16, 29-30, 36, 42. Not only was there no expert testimony *at all* in the record, there was no lay testimony concerning any mental condition, and only the single diagnosis of depression within the commitment documents. DX 5. But even this diagnosis was clearly limited: it reflected a "single episode," there was no signal the depression was chronic in nature, and there was no indication other than the crime itself that Brewer was a danger to anyone but himself. *Id.*; *see also* JA:39 (discussing suicide note). There is no ambiguity here. Any reasonable,

objective juror confronted with this amount and kind of evidence would not consider Brewer to be "mentally ill."

Further, while Brewer argues that he was involuntarily committed, the record reveals that Brewer actually signed "voluntary papers stating that he had signed a request for voluntary admission" to Big Spring State Hospital. *Id.* at 35, 140. The jury was fully aware that the initial "involuntary" commitment was initiated by Brewer's family based upon a suicide note and nothing more. *Id.* at 39. In fact, Brewer's mother testified that he "committed himself" because "he wanted to turn his life around" and "get off of drugs." *Id.* at 71-72. Brewer later checked himself out of Big Spring State Hospital to live with Nystrom in Amarillo. *Id.* Therefore, the record plainly refutes Brewer's effort to characterize his depression as an incurable or untreated mental illness that limited his impulse control. Indeed, Brewer presented no expert opinion on the matter. JA:216, 223-24 n.16.

Nevertheless, Brewer's evidence was plainly within the jury's reach because treatable mental problems can be given sufficient mitigating effect in answering the future-dangerousness inquiry.[12] But Brewer claims that "[n]o

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[12] *See, e.g., Hernandez,* 248 F.3d at 349 (holding "evidence of chronic schizophrenia could be considered by the jury in answering the question of future dangerousness," because "[w]ith medication and treatment, remission can be sustained"); *Robison v. Johnson,* 151 F.3d 256, 265-67 (5th Cir. 1998) (holding that evidence of petitioner's schizophrenia, including testimony that it was treatable and could go into remission, could be given mitigating effect under the future-dangerousness special issue); *Demouchette v. Collins,* 972 F.2d 651, 653 (5th Cir. 1992) (holding that a jury was able to consider the mitigating effect of evidence of personality disorder under first special issue where major thrust of evidence was that the disorder caused defendant to act impulsively rather than deliberately).

evidence before the jury indicated that Mr. Brewer's mental illness was treatable" and implies that no such treatment was "available." Brief at 29-30. Yet the jury heard testimony that Brewer *received treatment* during his stay at Big Spring State Hospital, a stay which was initiated to treat his drug problems. JA: 35-36, 70-72. According to Brewer's mother, this treatment was at least a temporary success, because he expressed a willingness to remain sober and "turn his life around." *Id.* at 71-72. A jury applying commonsense to this evidence would clearly understand that Brewer's depression was connected to his drug abuse and that he would not be exposed to such negative influences if imprisoned for life.[13]

The lower court recently held that evidence of a borderline personality disorder was not within the jury's reach in answering the future-dangerousness issue where conflicting expert testimony indicated that successful treatment was unlikely. *Nelson v. Quarterman*, ___ F.3d ___, 2006 WL 3592953, *20 (5th Cir. Dec. 11, 2006) (*en banc*). The court reasoned that

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[13] It should also be noted that, unlike in *Penry I*, the term "deliberately" was defined for Brewer's jury as "a manner of doing an act characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences; willful, slow, unhurried, and steady as though allowing time for a decision." JA:90. Given defense counsel's attempt to create residual doubt during sentencing and to portray Brewer as the puppet of more sophisticated actors (including his girlfriend, Nystrom), the jury's answer to the deliberateness special issue surely reflected a reasoned moral response to the mitigating evidence. *Penry I*, 492 U.S. at 323; *see also Davis v. Scott*, 51 F.3d 457, 462-64 (5th Cir. 1995) (holding far less substantive definition of "deliberateness" cured *Penry I* error), *abrogated on other grounds by Tennard*, 542 U.S. at 283-84; *but see Bigby*, 402 F.3d at 571 n.7 (distinguishing *Davis*).

> a juror considering Nelson's evidence of borderline personality disorder would have felt that he could give the evidence only one possible effect via the future-dangerousness issue: Such a juror would have seen the evidence as *only aggravating,* because Nelson's borderline personality disorder and the difficulty of treating it increase the likelihood that Nelson will act out violently again.

Id. at *21 (emphasis added). While the court of appeals questioned prior circuit authority[14] concerning treatable mental illness, *id.* at *25, it is clear that the *Nelson* court based its holding on the record and the notion that *Penry I* error occurs only where the mitigating evidence has only *aggravating* relevance to the special issues. In Brewer's case, however, there was no conflicting expert testimony concerning whether his brief bout of depression was treatable. In fact, as noted *supra,* the jury heard testimony that Brewer was successfully treated at a hospital. JA: 35-36, 70-72. Therefore, Brewer's depression could not have had *aggravating* relevance within the special issues.

Nelson and other recent Fifth Circuit opinions confirm this reasoning.[15] *See Coble,* 444 F.3d at 361-62 (holding

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[14] *See Lucas v. Johnson,* 132 F.3d 1069, 1082-83 (5th Cir. 1998) (finding evidence that a defendant was psychotic and schizophrenic, but that his mental problems had responded to antipsychotic drugs and was treatable, could be considered under the future-dangerousness special issue).

[15] As noted above, the *en banc* Fifth Circuit recently denied rehearing in the instant case. *See* Appendix. The court of appeals explicitly stated that its "vote should not be taken as conflicting with or modifying the majority decision in the recent *en banc* case, *Nelson v. Quarterman.*" *Id.* (citation omitted). This statement unequivocally confirms the fact that, in the view of the *Nelson* majority, the panel

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treatable bipolar and posttraumatic stress disorders within scope of future-dangerousness issue); *Cole,* 418 F.3d at 505-07 (holding organic neurological deficiency including diminished impulse control within scope of future-dangerousness issue); *but see Tennard,* 442 F.3d at 256 (finding *Penry I* violation where evidence showed low IQ, a "static trait" or "permanent physiological feature"); *Bigby,* 402 F.3d at 571 (paranoid schizophrenia not amenable to treatment or control not within scope of future dangerousness). A treatable mental disorder or an exceedingly ordinary problem like *a single episode* of drug-induced depression is distinctly different from a chronic mental illness, like Penry's, that prevents a defendant from ever learning from his or her mistakes. *Cole,* 418 F.3d at 505-07; *cf. Bigby,* 402 F.3d at 571 ("Even after being in the controlled environment of jail for some time, Bigby irrationally tried to take the trial court judge hostage in the presence of armed bailiffs," demonstrating inability to conform conduct with law). The *Nelson* majority did not overrule these opinions and, indeed, did not even mention them.

Brewer argues, Brief at 22-24, that the lower court's decision runs afoul of *Smith* and *Tennard* by attempting to revive the "severity" and "permanence" elements of the former constitutional-relevance test. Yet this Court noted that "gravity" has a place in the *Penry I* calculus "insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability." 542 U.S. at 286 (citation omitted). Gravity is a synonym for severity,

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opinion below is *entirely consistent* with *Nelson.* In other words, the cases are distinguishable on their facts.

seriousness, or importance. THE AMERICAN HERITAGE COLLEGE DICTIONARY 595 (3d ed. 2000). "Trivial" means insignificant or inessential. *Id.* at 1447. Similarly, transient or impermanent characteristics are less likely to mitigate culpability. If this were not the case, then mere intoxication at the time of the offense would be as mitigating as severe mental retardation. This is clearly not so. *See, e.g., Harris,* 313 F.3d at 242 (intoxication within the scope of the special issues for *Penry I* purposes); *James v. Collins,* 987 F.2d 1116, 1121 (5th Cir. 1993) (same). Either concept certainly bears on whether the likelihood of *Penry I* error is *reasonable.* Any other interpretation would lead to a *per se*-error analysis and overrule *Jurek, Graham,* and *Johnson.*

Moreover, *Tennard* and *Smith* do not support Brewer's argument, because the opinions deal only with the application of severity or permanence as a "screening test" which might foreclose reaching "the heart of [a petitioner]'s *Penry* [*I*] claims." *Tennard,* 542 U.S. at 282-86. Here, the court of appeals *did* reach the heart of Brewer's *Penry I* claim and discussed each category of the evidence at length. In fact, Brewer reads far too much into *Tennard* and *Smith* when he suggests that they dispense with any comparative analysis of the mitigating evidence. Reasonableness can hardly be judged in the absence of such comparisons. This is especially true where the relative permanence of a mitigating circumstance bears *directly* on the probability of future dangerousness.

Finally, unlike *Tennard,* the prosecutor did not ask the jury to consider Brewer's mitigating evidence as aggravating. The prosecuting attorney certainly argued the State

had carried its burden of proof concerning Brewer's probable future dangerousness.[16] JA:116-19. But the prosecutor based this argument on the *aggravating* evidence presented by the State, not Brewer's mitigating evidence. For example, the State asked the jury, "What kind of man can say that he loves a woman and slam her with this kind of force up against a locker?" *Id.* at 116-17. The prosecuting attorney also pointed out that, "[b]y the time [Brewer] is [fifteen] years of age, from that time on, he carries weapons, he carries knives . . . [t]o hurt people." *Id.* at 117. The State's argument that Brewer would "never change," *id.* at 118, was merely a legitimate response to defense counsel's suggestion that Brewer could be rehabilitated if sentenced to life in prison.[17] *Id.* at 102, 106-07. Importantly, however,

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[16] Brewer asserts that the State's argument to the jury to "honor [its] oath" and "answer the special issues honestly according to the evidence" violates *Penry II* and *Smith*. Brief at 19-22. This argument is specious. In both *Smith* and *Penry II*, such an argument was held to be problematic because of the supplemental instruction mechanism which "directed the jury to change one or more truthful 'yes' answers to an untruthful 'no' answer in order to avoid a death sentence." *Penry II*, 532 U.S. at 799; *see also Smith*, 543 U.S. at 48 n.5. No such instruction was given in this case. Nor does *Penry I* support Brewer's contention. There, the Court held that a similar prosecutorial argument *failed to alleviate* any Eighth Amendment error. *Penry I*, 492 U.S. at 325-26. Finally, Brewer's claim is illogical because the State was merely arguing it met its burden of proof. The State will make just such an argument *in every case*. But not every death penalty case results in *Penry I* error.

[17] Brewer suggests that "defense counsel never argued that Mr. Brewer's background of physical and psychological abuse and his mental illness could support an honest 'no' answer to the 'future dangerousness' question." Brief at 19, 26-27. But Brewer is wrong. Counsel urged the jury to answer negatively because Brewer was influenced to engage in violent and dangerous behavior by older and more sophisticated persons. JA:105-06. Defense counsel further suggested that "[l]ife in prison will make sure that [Brewer] will not be around wom[e]n that can influence him; will not be around fathers that can hurt him and beat him and influence him. Life in prison will get

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the prosecutor did not "press[] exactly the most problematic interpretation of the special issues, suggesting that [Brewer's mitigating evidence] was irrelevant in mitigation, but relevant to the question whether he posed a future danger."[18] *Cole,* 418 F.3d at 508 (quoting *Tennard,* 542 U.S. at 289).

IV. The State Court Reasonably Rejected Brewer's *Penry I* Claim.

On direct appeal, the Court of Criminal Appeals carefully considered Brewer's *Penry I* claim and reasonably applied the appropriate Supreme Court precedent. Initially, the state court's explication of the Eighth Amendment's evolution from *Jurek* to *Penry I* via *Lockett, Eddings,* and *Franklin* was a proper statement of the law. JA:137-39. The court then correctly explained that, in addressing a *Penry I* claim, it must determine:

> (1) what mitigating evidence was presented to the jury; (2) whether the [deliberateness and future-dangerousness] issues provided a vehicle for

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him away." *Id.* at 106. This is a clear suggestion that there was no probability Brewer would commit future acts of violence if sentenced to life imprisonment. It is certainly not a plea for "nullification," as Brewer claims. Brief at 19.

[18] Brewer argues that the State's voir dire invited the jurors to ignore the mitigating evidence in answering the special issues. Brief at 16-18 & n.8. But, as this Court reasoned in *Penry II,* it is doubtful that "jurors would have remembered the explanations given during voir dire, much less taken them as a binding statement of the law." 532 U.S. at 801. In Brewer's case, voir dire began more than four weeks before the sentencing phase of trial. Thus, "[t]he comments of the court and counsel during voir dire were surely a distant and convoluted memory by the time the jurors began their deliberations on [Brewer]'s sentence." *Id.* at 802.

> the jury to give effect to that evidence and, if not, (3) whether the trial judge provided, in its charge to the jury on punishment, a vehicle for the jury to effectively consider the mitigating evidence.

Id. at 139-40 (citing *Joiner v. State,* 825 S.W.2d 701, 706 (Tex. Crim. App. 1992)).

The state court also accurately described the mitigating evidence before the jury. JA:140. Finally, the court "conclude[d] the [future-dangerousness] issue provided an adequate vehicle for the jurors to give effect to [Brewer]'s mitigating evidence." *Id.* at 141. The court noted that "a stay in a mental hospital does not evidence a long-term mental illness which would affect [Brewer]'s ability to conform to the requirements of society." *Id.* (internal quotations omitted). The court also held that Brewer's evidence of drug abuse and a troubled childhood was within the scope of the future-dangerousness special issue. *Id.* As explained *supra,* this holding is not contrary to the Court's precedent nor is it an unreasonable application thereof.

Brewer criticizes the state court's reasoning as cursory and ill-founded. Brief at 34-46. However, as explained above, the state court's reasoning is inapposite under the AEDPA. It is only the court's ultimate decision that is to be reviewed. *Saiz,* 392 F.3d at 1176; *Wright,* 278 F.3d at 1255; *Santellan,* 271 F.3d at 193; *Cruz,* 255 F.3d at 86; *Matteo,* 171 F.3d at 891. The state court's decision—that there was no reasonable likelihood Brewer's mitigating evidence was outside the jury's effective reach in answering the special issues—is without question a reasonable application of *Jurek* and *Penry I.* Nonetheless, when the state court contrasted Brewer's single episode of depression with a "long-term mental illness," it did not fail to

"examine the trial record" as Brewer claims. Brief at 36. An examination of the trial record reveals that a single episode of depression is exactly what Brewer was diagnosed with. DX 5. Nor did the state court employ a "severity" or "nexus" analysis to screen out any mitigating evidence, as Brewer suggests. Brief at 38-39. The evidence is set forth, in its totality, in the court's opinion, and neither term appears therein. JA:140-41.

In any event, if the state court's decision was even arguably unreasonable, the lower court was entirely within its authority to consider and reject Brewer's claim *de novo*. Although Brewer suggests otherwise, Brief at 23, habeas corpus relief is precluded except where a person is "in custody pursuant to the judgment of a State court . . . in violation of the Constitution." 28 U.S.C. § 2254(a). The fact that a state court may have conducted an unreasonable analysis of a federal constitutional claim does not entitle Brewer to relief. It only means that a federal habeas court may avoid the deferential standard owed to reasonable state court judgments under § 2254(d) and review a petitioner's claim *de novo*.

Finally, overriding the state court's denial of Brewer's *Penry I* claim at this point would violate the recognized policy interests of comity and finality. As set forth in the STATEMENT OF THE CASE, this Court *twice* declined to review the state court's decisions in this regard in the last twelve years: once in 1995 and once in 2001. The finality of those judgments and the respect owed to them as a matter of federalism would be upset if the Court chose Brewer's *third* certiorari petition as a vehicle to invalidate his death sentence based on precedent that did not exist at the time. The *Teague* question is usually framed as "'whether a state court considering [the defendant's] claim at the time

his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'" *Goeke v. Branch,* 514 U.S. 115, 118 (1995) (quoting *Caspari v. Bohlen,* 510 U.S. 383, 390 (1994) (internal quotations omitted)). Here, not only would the state court have been compelled by *Johnson* and *Graham* to reject Brewer's *Penry I* claim, it appears this Court agreed.

Any other holding would unfairly trample the "reasonable, good-faith interpretations" of these precedents that the state court relied upon in adjudicating Brewer's *Penry I* claim. *Graham,* 506 U.S. at 467 (quoting *Butler v. McKellar,* 494 U.S. 407, 414 (1990)). Indeed, "reasonable jurists in [either 1994 or 2001] would have found that, under [the Court's] cases, the Texas statute satisfied the commands of the Eighth Amendment" with regard to Brewer's mitigating evidence. *Id.* at 472.

> The interests of the State of Texas, and of the victims whose rights it must vindicate, ought not to be turned aside when the State relies upon an interpretation of the Eighth Amendment approved by this Court, absent demonstration that our earlier cases were themselves a misinterpretation of some constitutional command.

Johnson, 509 U.S. at 366-67. Thus, to the extent the relief Brewer requests requires a new rule, both the AEDPA and the non-retroactivity doctrine of *Teague* bar relief.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be affirmed in all respects.

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-70034

BRENT RAY BREWER,

Petitioner-Appellee,

versus

NATHANIEL QUARTERMAN, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING EN BANC
(Opinion 3/1/06, 442 F.3d 273)

(Filed Dec. 27, 2006)

Before JOLLY, SMITH, and GARZA, Circuit Judges.

PER CURIAM:*

A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not

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* Judges King, Jolly, Davis, Barksdale, Benavides, Stewart, Dennis, and Clement did not vote.

disqualified not having voted in favor (FED. R. APP. P. 35 and 5TH CIR. R. 35), the Petition for Rehearing En Banc filed by appellee Brent Ray Brewer is DENIED.

This order is entered, and the court voted to deny rehearing en banc, solely to resolve any potential question of the judgment's finality in this court and to clarify the Supreme Court's jurisdiction over the case. Further, this court's vote should not be taken as conflicting with or modifying the majority decision in the recent en banc case, *Nelson v. Quarterman,* No. 02-11096, 2006 WL 3592953 (5th Cir. Dec. 11, 2006).

The mandate shall issue forthwith.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
Jerry E. Smith
United States Circuit Judge

DENNIS, Circuit Judge, dissenting from the attempt to exercise jurisdiction:

This case is in an unusual posture, as the Supreme Court granted the petition for certiorari while a petition for rehearing en banc was pending in this court. It is beyond dispute that the Supreme Court had the power and the jurisdiction to grant the writ, irrespective of the posture of the case in this court. Nevertheless, some judges on this court have taken the view that the Court may have granted certiorari under the mistaken impression that the petition for rehearing en banc had been denied by this court. Those judges believe that, unless this court or a minority of its judges now acts on the petition for rehearing, the Supreme Court might dismiss the writ as improvidently granted and decline to decide this case

on the merits. In its haste to attempt to ensure that the Supreme Court keeps the case and reaches the merits, however, the minority of this court's judges attempting to exercise jurisdiction herein have ignored well-established limits on this court's jurisdiction and, in the process, trespassed upon the jurisdiction of the Supreme Court. Because the Supreme Court granted certiorari in this case before this court ruled on the pending petition for rehearing en banc, finalized its judgment, or issued a mandate, the minority of active judges of this circuit who have chosen to vote in this poll do not now have jurisdiction to do any of those things. Accordingly, I disagree with their erroneous and futile effort to exercise jurisdiction by purporting to deny rehearing en banc, make the judgment of this court in this case final, and issue a mandate based on such invalid judgment.

When the Supreme Court granted certiorari, because there was a petition for rehearing pending, there was no final judgment by this court in this case. *See Hibbs v. Winn*, 542 U.S. 88, 97-98 (2004) (explaining that a timely-filed petition for rehearing prevents a court of appeals' judgment from being final under 28 U.S.C. § 2101; "In other words, 'while [a] petition for rehearing is pending,' or while the court is considering, on its own initiative, whether rehearing should be ordered, 'there is no 'judgment' to be reviewed.'") (quoting *Missouri v. Jenkins*, 495 U.S. 33, 46 (1990)) (alteration in original). Our jurisdiction to perform further judicial acts in this case was, moreover, terminated when the Supreme Court granted certiorari. Also, when the Supreme Court granted certiorari, this court certified the record and transported it to the Supreme Court. Because we have no jurisdiction, no case, and no record upon which to act, the judges casting votes

against granting rehearing en banc in this case act without any authority to do so, and any judgment or mandate based on their votes is invalid. They also clearly lack the authority or ability to advise the Supreme Court or influence what the Supreme Court should do in this case before or after its January oral argument. In sum, no matter what we have done or left undone, the Supreme Court has the power and jurisdiction to grant certiorari and render a decision on the merits in this case, and because the Supreme Court granted certiorari and thereby took the case out of our hands before we had completed our consideration of the case, rendered a final judgment, or issued a mandate based upon that final judgment, even a majority of this court no longer has jurisdiction to perform any of those judicial acts in this case. Any attempt by members of this court to take such actions can only be seen as, at best, a misguided and presumptuous attempt to correct a perceived mistake by the Supreme Court or the parties in that court, or, at worst, an improper trespass and attempt to influence the Supreme Court's future actions in this case.

The general common law rule is that "unless otherwise abrogated or modified by statute, a writ of certiorari takes the record out of the custody of the inferior tribunal, leaving nothing there to be prosecuted or enforced by execution, and operates as a stay of execution." 14 AM. JUR. 2D *Certiorari* 74 (2d ed. 2006). The case law strongly supports this view. In *Louisville, N.A. & C. Ry. Co. v. Louisville Trust Co.*, 78 F. 659, 662 (C.C. Ky. 1897), the court stated the rule emphatically:

> But it is to be remembered that the writ of certiorari is of itself and proprio vigore a supersedeas. Neither the inferior court nor the officer holding

> the process of such inferior court can rightfully proceed after formal notice of its having been issued. Every act done after such notice is not only irregular, but absolutely void; and the parties doing such acts are trespassers.

Similarly, in *Waskey v. Hammer,* 179 F. 273 (9th Cir. 1910), the Ninth Circuit summarized the common law authorities on this subject and noted that:

> Very many English as well as American authorities are quoted in *Patchin v. Mayo,* etc., 13 Wend. (N.Y.) 664. There are very many others, all holding a common-law writ of certiorari, whether issued before or after judgment, to be in effect a supersedeas. There are none to the contrary. In some of them it is ruled that action by the inferior court after the service of the writ is erroneous; in others it is stated to be void and punishable as a contempt. They all, however, assert no more than that the power of the tribunal to which the writ is directed is suspended by it, that the judicial proceedings can proceed no farther in the lower court.

Id. at 274 (quoting *Ewing v. Thompson,* 1862 WL 4971 (Pa. 1862)); *see also Orth v. Steger,* 258 F. 625, 626 (D.C.N.Y. 1919) ("Except where the common-law rule has been changed, a certiorari to a subordinate court or tribunal or an officer operates as a stay of proceedings from the time of its service or of formal notice of its issue, unless the judgment or order complained of has begun to be executed.") (internal quotation marks omitted).

Although these authorities are old, I have found nothing to suggest that they do not remain good law, and a number of more recent authorities also support the view that a court lacks jurisdiction to act once certiorari has

been granted. *See Hermann v. Brownell,* 274 F.2d 842, 843 (9th Cir. 1960) ("When a case is appealed from this Court to the Supreme Court, this Court completely loses jurisdiction of the cause. Thereafter, our jurisdiction can be revived only upon the mandate of the Supreme Court itself. . . .")**; *Ligon v. Bartis,* 561 S.E.2d 831, 833 (Ga. App. 2002) ("[W]hile the actual *granting* of a writ of certiorari by the United States Supreme Court operates as a stay, the mere *filing* of a petition for certiorari does not."); *Owens v. Hewell,* 474 S.E.2d 740, 742 (Ga. App. 1996) (noting same); *see also United States v. Eisner,* 323 F.2d 38, 42 (6th Cir. 1963) (distinguishing *Waskey* and *Orth* on the ground that they dealt with situations in which certiorari was issued); *State v. Kate C.,* No. A-01-958, 2002 WL 31002490, at *6 (Neb. App. Aug. 6, 2002) (noting that "[o]ther courts have specifically held that while the actual *granting* of a writ of certiorari by the U.S. Supreme Court operates as a stay, the mere *filing* of a petition for writ of certiorari does not operate as a stay") (citing *Ligon,* 561 S.E.2d at 833); *cf.* Fed. R. App. P. 41(d)(2)(B) (providing that, where mandate is stayed during the pendency of a petition for certiorari, "the stay continues until the Supreme Court's final disposition").

The Supreme Court's grant of certiorari has the purely jurisdictional effect of staying the court of appeals' ability to perform further judicial acts in the case. The writ's effect does not necessarily extend, however, to other matters outside this jurisdictional context, such as the accrual of forfeitures or the running of time under a statute of limitations. Accordingly, in *McCurry v. Allen,*

** Although the *Hermann* court spoke in terms of appeals, that case actually involved a grant of certiorari by the Supreme Court.

688 F.2d 581, 586 (8th Cir. 1982), the Eighth Circuit held that the Supreme Court's grant of certiorari did not toll a statute of limitations so as to allow the adding of parties in a civil rights case. Unfortunately, the court based its decision in that case only upon a broad statement taken from a Supreme Court practice manual, which, if not read carefully and within proper context, could be misleading. The practice manual states in passing that the grant of certiorari does not "operate[] as a stay, either with respect to the execution of the judgment below or the issuance of the mandate below to a lower court." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 17.10, at 769 (8th ed. 2002). That this statement does not relate to the lower court's power to conduct proceedings in a case that is before the Supreme Court on certiorari is clear from careful attention to its wording, as well as the only direct authority cited, and the context of the statement within the manual. In *St. Regis Paper Co. v. United States*, 365 U.S. 857 (1961), the only case that the authors directly cite in support of their statement, the Court simply granted a stay of the accrual of forfeitures ordered below while the case was pending in the Supreme Court. Further, the section of the manual in which the statement appears is concerned only with stays of preexisting final judgments pending the Supreme Court's disposition of a case, not with the question of an inferior appellate court's authority to continue to act in the case after the Supreme Court has granted certiorari. In sum, the effect of the Supreme Court's grant of certiorari is primarily that of supplanting the court of appeals' inferior jurisdiction with its own superior jurisdiction and of thereby staying the performance of further judicial acts in the case by the court of appeals. The court of appeals no longer has the authority to act upon the case in light of the Supreme Court's exercise of

jurisdiction and complete assumption of the case and its record. Thus, that one court and one practice manual have concluded that the Supreme Court's grant of certiorari does not stay matters other than the court of appeals' judicial acts, such as the running of statutes of limitation and the accrual of forfeitures, should not mislead a court of appeals into thinking it can continue to rehear a case, render judgments and issue mandates after the Supreme Court has granted certiorari, thereby taking the case and the record from the court of appeals' jurisdiction.

For these reasons, I conclude that the Supreme Court's grant of certiorari in this case, which caused the case and its record to be transferred to the Supreme Court, deprives us of any case or record upon which to perform the judicial functions of considering and voting on whether to grant the pending petition for en banc rehearing, deliberating and rendering a final judgment on that petition, or issuing a mandate based on such a final judgment. Consequently, we lack the jurisdiction to take any of the foregoing judicial actions, and any attempt to do so by judges of this court, whether by a majority or a minority, is not only ineffectual but also an improper trespass on the Supreme Court's jurisdiction.

UNRETOUCHED

(11)

No. 05-11287

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In The
Supreme Court of the United States

BRENT RAY BREWER,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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A. Respondent declines to defend the rationale of the state court's decision denying relief under *Penry v. Lynaugh*, 492 U.S. 302 (1989), but fails to explain how jurors could have concluded that the relevant mitigating qualities of Mr. Brewer's background of physical abuse and mental impairment supported a "no" answer to the future dangerousness issue.

In his opening brief, Mr. Brewer explained in detail why the categorical rejection of his *Penry* claim by the Texas Court of Criminal Appeals ("CCA") was objectively unreasonable in light of then-existing clearly established Federal law, and thus why it is appropriate for this Court to intervene and correct it under 28 U.S.C. § 2254(d). *See* Brief for Petitioner ("PB") 33-47. Respondent offers no competing explanation; he simply asserts, without more, that "[t]he state court's decision – that there was no reasonable likelihood [that Mr.] Brewer's mitigating evidence was outside the jury's effective reach in answering the special issues – is without question a reasonable application of *Jurek* and *Penry I*." Brief of Respondent ("RB") 42. Further, Respondent insists that he need not defend the CCA's reasoning to prevail under § 2254(d) because only "the state court's ultimate decision denying relief," and "not its reasoning," need be "tested for unreasonableness." RB 14; *see also* RB 43 (same).[1] Respondent

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[1] Respondent's reticence in embracing the CCA's reasoning is understandable. Respondent denies that the CCA, in overruling Mr. Brewer's *Penry* challenge, "employ[ed] a 'severity' or 'nexus' analysis. . . ." RB 44 (noting that "neither term appears" in the state court's opinion). But as we have amply demonstrated, *see* PB 36-41, the cases cited by the CCA to support its rejection of Mr. Brewer's *Penry* claim on direct appeal are firmly grounded in precisely the "nexus" and "severity" limitations this Court struck down in *Tennard v. Dretke*, 542 U.S.

(Continued on following page)

thus fails to offer any explanation of his own for how the state court could reasonably have found Mr. Brewer's mitigating evidence to have supported a "no" answer to the future dangerousness question, while pointedly refusing to defend the *ratio decidendi* by which the CCA actually *did* reject Mr. Brewer's *Penry* claim.[2] Respondent's argument

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274 (2004). Moreover, two of the cases cited by the CCA in that opinion (*Brewer v. State*, No. 71,307 (Tex. Crim. App. 1994) (unpublished)) are among those *Respondent* has previously cited to this Court as illustrations of how the CCA routinely foreclosed *Penry* claims unless they involved "continuing, long-term, or permanent" disabilities that were "sufficiently severe" and causally connected to the crime. *See* Brief of Respondent, *Tennard v. Dretke*, No. 02-10038 (O.T. 2002) at 22-28 and accompanying notes (citing, *inter alia*, *Joiner v. State*, 825 S.W.2d 701 (Tex. Crim. App. 1992) and *Goss v. State*, 826 S.W.2d 162 (Tex. Crim. App. 1992)).

[2] Respondent cites several cases for its claim that the state court's reasoning is irrelevant under § 2254(d), but most of them do not support it. For example, *Saiz v. Ortiz*, 392 F.3d 1166, 1176 (10th Cir. 2004), notes that the Tenth Circuit has not followed the practice of looking solely to the state court's result "where the state court's explicit reasoning contravenes Supreme Court precedent." *Saiz*, 392 F.3d at 1176 (citation omitted); *see also, e.g.*, *Stevens v. Ortiz*, 465 F.3d 1229, 1235 (10th Cir. 2006) ("When we review a summary disposition by a state court, we focus on its result rather than any reasoning," citing *Saiz*; "[h]owever, when applying AEDPA to fully reasoned opinions . . . , this circuit has not focused solely on the result 'where the state court's explicit reasoning contravenes Supreme Court precedent' "). Similarly, *Wright v. Dept. of Corrections*, 278 F.3d 1245, 1255 (11th Cir. 2002), acknowledges that the Eleventh Circuit had previously held that a federal habeas court should consider whether a state court had "explicitly misapplied the controlling Supreme Court decision," because a state court's "failure . . . to set out its reasoning is not equivalent to the conspicuous misapplication of Supreme Court precedent." *Id.* at 1256 n.3 (citation omitted). *Long v. Humphrey*, 184 F.3d 758, 760-61 (8th Cir. 1999), specifically identifies the reasons the state court gave for its challenged action in that case, *see id.* at 761, and in this regard is consistent with subsequent Eighth Circuit cases considering the state court's reasoning as part of the § 2254(d) analysis. *See, e.g.*, *Huss v. Graves*, 252 F.3d 952, 955-56 (8th Cir. 2001) (finding that the state court decision was unreasonable because it "applied the incorrect legal

(Continued on following page)

for upholding the Fifth Circuit's judgment endorsing Mr. Brewer's death sentence, then, reduces to his weak attacks on Mr. Brewer's evidence and the other circumstances we have identified as relevant to the inquiry under *Boyde v. California*, 494 U.S. 370 (1990). It is to those matters that we now turn.

B. Respondent's assertions about Mr. Brewer's history of physical and emotional abuse as an adolescent either ignore or distort the record.

Respondent contends that the Fifth Circuit was correct in holding that Mr. Brewer's evidence of a troubled childhood "was within the purview of future dangerousness especially where, as here, the possibility of rehabilitation was highlighted by the defense." RB 21. For this proposition, Respondent cites the Fifth Circuit's opinion rather than the trial record. It's easy to see why. Nowhere during

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standard to [the petitioner's] case," by relying on particular language in one Supreme Court opinion "to the exclusion of other relevant considerations"). Similarly, Respondent's citation to *Matteo v. Superintendent*, 171 F.3d 877, 891 (3rd Cir. 1999), for this proposition is undermined by later Third Circuit cases assessing a state court's reasoning as part of the § 2254(d) analysis. *See, e.g., Bronshtein v. Horn*, 404 F.3d 700, 723-24 (3rd Cir. 2005) (finding state court to have unreasonably applied *Batson*, based on the state court's reasoning "that the record suggested legitimate reasons that could have motivated the prosecutor to exercise the contested peremptory challenge"). These opinions make plain that no such consensus exists among the Circuits that in applying § 2254(d), a federal court must ignore the state court's reasoning. Any such approach, moreover, would appear to be out of step with this Court's observation that the focus under § 2254(d) should be on whether "*the reasoning []or the result* of the state-court decision contradicts" Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 7-8 (2002) (*per curiam*) (emphasis added); *see also, e.g., Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) (examining the Virginia Supreme Court's reasoning, and not simply its result, on the way to determining that its rejection of Williams' ineffective-assistance claim was objectively unreasonable).

their penalty-phase closing arguments did either of Mr. Brewer's lawyers claim that any aspect of his character or background improved his prospects for rehabilitation. "Rehabilitation" appeared only when defense counsel told the jurors they should regard rehabilitation as a more worthy goal of punishment than retribution. *See* JA 102, 107 (contrasting "eye for an eye" retribution with "deterrence and rehabilitation").[3]

Respondent places great weight on the claim that Mr. Brewer "could not have been physically abused at all until after the age of fifteen," and urges that the testimony indicates that he "experienced a reasonably idyllic childhood" prior to that age. RB 31. These attempts to minimize the trauma Mr. Brewer experienced as a child fail for several reasons. First, there was evidence that Mr. Brewer's childhood relationship with his stepfather Don was not "idyllic," even if it did not involve physical mistreatment. Mr. Brewer's mother Karon acknowledged that Don treated Mr. Brewer "really well" immediately after she married him, but "after

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[3] The penalty-phase closing arguments for the defense touched on a range of topics. *Inter alia*, defense counsel argued that the killing wasn't deliberate because it was "a robbery [that] went awry," JA 103 and 108-10; that Mr. Brewer's prior bad acts did not prove his future dangerousness beyond a reasonable doubt, JA 104-05 and 111-12; that imprisoning Mr. Brewer would protect him from the bad influence of others, including his father who "hurt him and beat him and influence[d] him," JA 105-06; that Dr. Coons' hypothetical testimony predicting Mr. Brewer would be dangerous was unreliable, JA 106-07 and 110-11; that Mr. Brewer, if spared, would have to serve fifteen years in prison before becoming parole-eligible, JA 112; and that counsel appreciated the importance of the jurors' duty and the difficulty of their task, JA 102, 108, 113. But defense counsel never once argued – *could* not argue, consistent with common sense – that Mr. Brewer's history of abuse and hospitalization for depression supported a "no" answer to the future dangerousness question.

he and I had a child, . . . he ignored Brent, just like he wasn't there." JA 65; *see also* JA 53. Don treated his own daughter conspicuously better than he treated young Mr. Brewer, and Mr. Brewer felt pain from that neglect. *Id.* at 66. Equally troubling, Mr. Brewer was smoking marijuana by the time he was in junior high school. *Id.* While Mr. Brewer may not have been a target of savage physical abuse prior to age fifteen, he was neglected by his stepfather and was using drugs at an age when he was especially vulnerable to their destructive long-term effects, neither of which supports describing his childhood as "idyllic."

More important, Respondent's emphasis on "the lone documented physical confrontation between [Mr.] Brewer and his father" during Mr. Brewer's teenage years, RB 32, ignores not only the testimony about the violent mistreatment of Mr. Brewer at his father's hands, but also the undisputed testimony that the relationship between Mr. Brewer's parents was pervasively violent and that Mr. Brewer himself was routinely exposed to violence in the home when he was an adolescent. Remarkably, Respondent calls it "a stretch" to characterize the physical abuse of Mr. Brewer by his father as "extensive," because the record reveals "only three instances" of physical abuse leaving "no serious injuries." RB 32 n.10. In fact, the record reflects "only three instances" where Mr. Brewer was "*hit with objects*." *See* JA 65 (emphasis added). On those three separate occasions, Mr. Brewer's father assaulted him with "the butt of a pistol," "a flashlight," and "a stick of firewood." *Id.* Before she was asked about her husband's hitting Mr. Brewer with objects, however, Mrs. Brewer was asked whether she had ever seen her husband "beat on Brent." *Id.* She replied, "Yes, he has hit Brent *numerous times*." *Id.* (emphasis added). A reasonable

juror would not fail to understand that the beatings were frequent, even if the weapon-wielding assaults were not.[4]

Moreover, undisputed testimony described the relationship between Mr. Brewer's parents as fraught with open violence. His father's outbursts involved yelling, throwing things, and "beat[ing] on" Mr. Brewer's mother. JA 65, 51-52; *see also* JA 61 (testimony of Mr. Brewer's father that "at times" he "beat [his] wife real bad," including "throwing chairs [at her] in a rage"). These incidents were probably fueled by the fact that Mr. Brewer's father was drinking heavily during this period. JA 48-49; *see also* JA 47 (Mr. Brewer's father "used to buy half a gallon of vodka and drink it out of the bottle"). Mr. Brewer saw these attacks. JA 64. Sometimes the assaults produced "swollen eyes" and "broken noses." *Id.* at 62. Mr. Brewer's father described how events would unfold:

> Q: When you and Karon got back together, how would you describe your relationship . . . ?
>
> A: Well, good – you know, when it's good, it's good. But I've got a lot of problems, and when I was violent or things didn't go my way, I get violent, you know.

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[4] Respondent's argument raises an interesting question: how many times would a parent have to assault a child with a blunt instrument, as Mr. Brewer's father did three times here, before Respondent would agree that the abuse qualified as "extensive?" Most of us, thankfully, have never been hit by our parents with a flashlight, or the butt of a pistol, even once. In light of Mrs. Brewer's testimony that Mr. Brewer's father hit him "numerous times," a reasonable juror would be richly entitled to infer that these three incidents represented just the tip of the iceberg. *See, e.g.*, Brief of *Amici Curiae* The American Academy of Child and Adolescent Psychiatry, *et al.*, at 5 n.4 ("one major study" found that "81% of maltreated child and adolescent subjects reported that they experienced more than one type of maltreatment").

Q: Did you beat Karon up?

A: Yes, sir.

Q: Did she have to call the police on you sometimes?

A: Yes, sir.

Q: Was Brent around when that happened?

A: Yes, sir.

Q Did you and Brent have fights about that?

A: Yes, sir. Well, it wasn't me and Brent having fights. Me and her had fights, and he loved both of us, and he was drawn two different directions, and he got between. But then, I just got mad at him, too, you know, and that's what started it.

Q: Okay. Tell the jury what you told Brent when he would get between the two of you.

A: "If your [sic] ever draw your hand back, you'd better kill me, because I'll kill you."

JA 50. Thus, the home in which Mr. Brewer lived from age fifteen was painted vividly for the jury as a place where his father regularly flew into a drunken rage, "beat up" his mother and threatened to kill Mr. Brewer.

Exposure to domestic violence psychologically disfigures and emotionally damages children. As former Attorney General John Ashcroft has cautioned,

> [W]hen families are wracked by violence and abuse, values are corrupted. The messages transmitted by parents are messages of violence, cruelty, and powerlessness. . . . Domestic violence damages children. Thousands of children have

> been scarred by violence in their homes. Sometimes they are terrified witnesses of abuse; and sometimes they are the victims. But always, these children absorb messages of violence.

See Brief of *Amici Curiae* Child Welfare League of America, *et al.*, at 4 (citing remarks of Attorney General Ashcroft at the Annual Symposium on Domestic Violence in October 2002). Respondent's efforts to deny the significance of this evidence are also at odds with statements in a study of domestic violence awareness sponsored by *Respondent's own counsel*, the Office of the Texas Attorney General, which states without qualification that "Children who grow up with domestic violence are much more likely to perpetrate violence." Executive Summary, *Prevalence, Perceptions, and Awareness of Domestic Violence in Texas* (as revised, May 2003) at 6 (available at http://www.oag.state.tx.us/newspubs/releases/2004/pac_exec_summary.pdf).

Although Respondent gamely tries to downplay these disturbing facts about Mr. Brewer's background as "hardship" that was "experienced . . . only briefly," a reasonable juror would find it significant that Mr. Brewer was regularly exposed to serious domestic violence over a period of several years; that he was hit by his father "numerous" times, including three times with weapons; and that his father regularly threatened to kill him.[5]

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[5] A few words are also necessary to ensure a fair characterization of the 1989 incident in which Mr. Brewer and his father fought, with Mr. Brewer injuring his father seriously enough that he had to be hospitalized. *See* JA 51-52, 22-31 (describing this event and its aftermath). First, there is absolutely no evidence for Respondent's bold claim that "by this time in his life," Mr. Brewer "was routinely the aggressor" in the conflicts with his father. *See* RB 32. Respondent cites to JA 65, but that page – like the rest of the record –provides nothing whatsoever

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C. Reasonable jurors would have regarded Mr. Brewer's hospitalization for depression shortly before the murder as evidence of a substantial mental impairment.

With respect to the evidence that Mr. Brewer was hospitalized for an episode of depression shortly before the murder, Respondent accuses Mr. Brewer of "irresponsible exaggeration" for characterizing his condition as a "mental impairment." RB 35. While it is true that the defense presented no expert testimony at trial to elaborate on the details of Mr. Brewer's depression, the jury heard that Mr. Brewer was hospitalized after writing a suicide note to his family, *see* JA 39; that he was examined by a physician for mental illness before being committed, *see* JA 35, 37; that the judge who signed the commitment order heard testimony from a "social worker" that led her to believe that Mr. Brewer "could be a threat to himself because of the suicide [note]," JA 39; and that upon his admission he was diagnosed as suffering from depression. DX 5. Given the widespread popular appreciation that depression can be a debilitating disorder, this was certainly sufficient evidence to persuade a reasonable juror that Mr. Brewer was, just a

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to support this claim. Second, Mr. Brewer's father acknowledged that the 1989 fight began when Mr. Brewer intervened to protect his mother from yet another beating by his father. *See* JA 52, 59. Finally, there was testimony that the knowledge of how gravely he had injured his father "tore [Mr. Brewer] up mentally." JA 59; *see also* JA 56 (Mr. Brewer had "tears in his eyes" immediately after the fight), JA 60 (Mr. Brewer "apologized over and over" for hurting his father). Like many families beset by turmoil and violence, the Brewers apparently loved one another even as they nearly killed one another. JA 54. This is hardly a one-dimensional story of "aggressive behavior" by Mr. Brewer that "culminated in murder," *see* RB 32, but instead a gripping portrayal of a complex tragedy that led to the ruin of several lives, both inside the Brewer household and out.

few weeks before the murder, exhibiting a substantial "mental impairment."

Equally shaky is Respondent's claim that the evidence showed that Mr. Brewer had been successfully treated for the depression that led him to threaten suicide a few weeks before the murder. *See* RB 36-37. While it is true that Mr. Brewer's mother testified that at about the time of his release, Mr. Brewer expressed a hope that he could stay off drugs and turn his life around, JA 71, there is no warrant for Respondent's wild inferential leap that "[a] juror applying commonsense to this evidence would clearly understand that [Mr.] Brewer's depression was connected to his drug abuse and that he would not be exposed to such negative influences if imprisoned for life." RB 37 (footnote omitted). It is just as likely that Mr. Brewer's use of drugs was a *consequence* of his depression, rather than a cause, and that he found himself unable to avoid such self-medication after he was out of the hospital precisely because his depression had not permanently abated.

In any event, Respondent's claim that there was no evidence "other than the crime itself" that Mr. Brewer was still suffering from mental problems after his release, RB 35, is reminiscent of the old joke about Ms. Lincoln at Ford's Theatre ("Other than that, Ms. Lincoln, how did you like the play?"). It is precisely because the murder took place such a short time after Mr. Brewer's mental problems were objectively identified as serious enough to warrant hospitalization that a reasonable juror might well have linked the two events, concluding both that Mr. Brewer remained impaired (notwithstanding his release from treatment) and that his continuing impairment made him an acute danger to others. This inference is especially strong given the enduring popular misperception that mental disorder predisposes many of those suffering from

it to violent behavior. *See* PB 28-29 n.16 (citing numerous authorities).[6]

Respondent continues to dispute the circumstances of Mr. Brewer's original commitment for treatment. *See* RB 36. The record on this point is clear. As made plain by the testimony of the judge who signed the commitment order, Mr. Brewer was originally *involuntarily* committed for treatment after writing a suicide note to his family. *See* JA 34 (identifying the initial commitment as one made "against his [*i.e.*, Mr. Brewer's] will"). Seventy-two hours later, at a probable cause hearing, the judge heard testimony from hospital staff that Mr. Brewer "did need to have further hospitalization at the Big Spring State Hospital." JA 35. After that probable cause hearing, Mr. Brewer ultimately "signed a request for voluntary admission." *Id.* The jury was aware that the initial commitment was involuntary and was triggered by Mr. Brewer's suicide note, and that he subsequently agreed to submit himself to continued hospitalization.

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[6] We have already explained, *see* PB 29-30, that the purported "treatability" of a defendant's mental impairment is not a legitimate basis for denying relief under *Penry*. That said, Respondent clearly errs in claiming that the Fifth Circuit's recent *en banc* decision in *Nelson v. Quarterman*, ___ F.3d ___, 2006 WL 3592953 (5th Cir. Dec. 11, 2006) (*en banc*), endorses the "non-treatability" condition for *Penry* relief. *See* RB 37-38 (attempting to distinguish *Brewer* from *Nelson* on the ground that in *Nelson* there was "conflicting expert testimony concerning whether [Nelson's condition] was treatable"). The *en banc* majority in *Nelson* does not follow the Fifth Circuit's prior "bright line" approach under which any conceivably treatable mental disorder was *ipso facto* outside *Penry*'s scope. *Id.* at *25. *Nelson* focuses instead on whether the relevant mitigating qualities of the defendant's particular condition are within the jury's effective reach by tending to support a "no" answer to the "future dangerousness" question. *See Nelson* at *21. Respondent's assertion that *Nelson* did not overrule prior misguided Fifth Circuit authority on this point, *see* RB 39, is difficult to square not just with the majority opinion in *Nelson*, but also with the dissenting opinions, which clearly understand the majority to have turned onto a new path.

D. The specific circumstances of this case, including the voir dire questioning of the jurors and the penalty-phase closing arguments of counsel, compel the conclusion that jurors lacked a vehicle for giving meaningful consideration to the relevant mitigating qualities of Mr. Brewer's evidence.

Two final aspects of Respondent's brief deserve comment. First, Respondent asserts that both the physical abuse Mr. Brewer suffered as an adolescent and the mental problems he was suffering shortly before the crime could have persuaded a reasonable juror to answer the "future dangerousness" question "no." *See* RB 33 (the evidence that Mr. Brewer was beaten and mistreated by his father was "certainly not *aggravating* within the scope of the future-dangerousness issue," and "without a doubt, [is] within the scope of future dangerousness when viewed objectively") (emphasis in original); RB 36 ("treatable mental problems can be given sufficient mitigating effect in answering the future-dangerousness inquiry"). Yet, Respondent does not even attempt to explain what sensible chain of reasoning might get a juror from those premises ("Mr. Brewer suffered serious physical and emotional mistreatment from his father as a teenager"; "Mr. Brewer was hospitalized for depression and suicidal ideation shortly before the crime") to the desired conclusion ("Therefore, Mr. Brewer is less likely to be dangerous in the future"). And the reason for Respondent's omission is that no such common-sense link exists. *See* PB 12-15.[7] Circumstances like these are offered in mitigation to

[7] *Amici* agree that "there is nothing about [a history of child abuse] that categorically demonstrates that the defendant is less likely to be dangerous in the future." Brief of *Amici Curiae* The American Academy of Child and Adolescent Psychiatry, *et al.*, at 25. Moreover, extensive evidence from popular culture suggests that jurors widely hold the notion that

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explain, not *rebut*, a defendant's violent past conduct and likely future dangerousness. Trial counsel could not offer any theory of how the relevant mitigating qualities of Mr. Brewer's abused background or mental impairment made him less dangerous. At least in the specific circumstances of this case – where the jurors were emphatically and repeatedly discouraged during voir dire from viewing the special issues as permitting a broad assessment of Mr. Brewer's moral culpability or the appropriate sentence in light of all the evidence – *some* explanation of *some* rational path of reasoning from the relevant mitigating qualities of the defendant's evidence to a conclusion of non-dangerousness is essential to a finding that that evidence was within the jurors' effective reach under the "future dangerousness" issue. Neither Respondent, the Fifth Circuit, nor the Court of Criminal Appeals has been able to provide one.

Finally, it is necessary to rebut Respondent's astonishing assertion that "the prosecutor did not ask the jury to consider [Mr.] Brewer's mitigating evidence as aggravating." RB 40. In memorably colorful and direct prose, the prosecutor did *exactly* that:

> And, you know, folks, you can take a puppy, and you can beat that puppy and you can make him mean, but if that dog bites, he is going to bite the rest of his life, for whatever reason. *Whatever got him to this point, he is what he is today. And that will never change. That will never change.*

JA 118 (emphasis added). Respondent does not even acknowledge this argument, much less try to deny its

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"childhood abuse and trauma are often catalysts for adult acts of violence." Brief of *Amici Curiae* Child Welfare League of America, *et al.*, at 19-24.

aggravating force. The import of the prosecutor's remarks – that the "beatings" he endured as a "puppy" made Mr. Brewer "what he is today," *i.e.*, a "dog" who will "bite the rest of his life [and] never change" – is precisely the same as the Court confronted in *Tennard*. *See Tennard*, 542 U.S. at 289 (jurors might have given Tennard's low IQ evidence aggravating effect under the future dangerousness issue in part "because the prosecutor told them to do so" by arguing that Tennard's low IQ was "really not the issue" and that the focus of the question was "the fact that he is a danger," rather than "the reasons why he became a danger"). Both here and in *Tennard* the prosecutor "pressed exactly the most problematic interpretation of the special issues" when he ruled out consideration of "whatever got [Mr. Brewer] to this point" and directed the jurors to focus instead on "what he is today." *Id.*[8]

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[8] This effect was only heightened by the fact that the prosecutor during voir dire had repeatedly reinforced the narrowness of the inquiries under the special issues. *See* PB 15-18 (describing prosecutor's questions in detail). Respondent suggests that this Court's opinion in *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*") discounts the importance of voir dire questioning in assessing jurors' likely understanding of their penalty-phase instructions, because of the passage of time between the two. *See* RB 42 n.18 (citing *Penry II*, 532 U.S. at 801). We think Respondent misreads *Penry II* on this point, but in any event the problem was exacerbated here by the fact that the prosecutor specifically *reminded* the jurors in closing argument that trying to take a broader view of the special issues would deny both parties "a fair trial" – the precise language in which he had couched the same warnings during voir dire. *See* PB 19-20. On this record, the voir dire questioning in combination with the prosecutor's closing argument amply supports a finding that the jurors did not understand themselves to be entitled to express in their answers to the "special issues" any broad conclusion about the appropriate sentence in light of all the evidence.

CONCLUSION

The Fifth Circuit wrongly reversed the District Court's thoughtful opinion granting Mr. Brewer relief. Neither the Court of Appeals' opinion or the CCA's can be reconciled with *Tennard*. The relevant mitigating qualities of Mr. Brewer's abused childhood and mental impairment as a young adult bore no relationship to either of the two pre-1991 Texas special issues that were submitted to the jury as the sole determiners of his sentence. Moreover, the prosecutor exploited the facial narrowness of those questions by insisting that Mr. Brewer's jurors answer them solely on the basis of the evidence, without regard to their consequences for the appropriate sentence. Under these circumstances, the CCA applied *Penry* in an objectively unreasonable manner in denying relief. This Court should reverse the Fifth Circuit and instruct it to reinstate the judgment of the District Court granting habeas corpus relief.

Respectfully submitted,

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Supreme Court of the United States

JALIL ABDUL-KABIR, fka TED CALVIN COLE,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

BRENT RAY BREWER,
Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, THE AMERICAN ASSOCIATION ON INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, THE ARC OF THE UNITED STATES, MENTAL HEALTH AMERICA, AND THE NATIONAL ALLIANCE ON MENTAL ILLNESS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are national clinical and mental disability organizations (more fully described in the Appendix) with long-standing concerns about legal protections for people with mental disabilities.[1]

SUMMARY OF ARGUMENT

Medical understanding of the consequences of child abuse has made important advances in recent decades. We now know much more about the physical effects of abuse on the child's developing brain. We also have a better understanding of how neurological damage can affect an individual's later behavior, particularly if the abuse goes unrecognized and its effects go untreated during childhood. We are also gaining a fuller understanding of serious mental illness.

This brief summarizes the recent scientific and medical research (almost all of which is published in peer-reviewed journals) on child abuse and mental illness. In particular, Part II of the brief addresses the processes of the development of the brain, the clinical effects of stress and PTSD, physical injuries to the brain, and the effects of sexual and emotional abuse, as well as the mental health and cognitive effects of childhood abuse on adults. Part III of the brief also addresses our understanding of the effects of serious mental illness (whether it is caused by abuse or by other factors).

Evidence that a capital defendant suffered abuse as a child can be a crucial consideration to jurors who are deciding whether to impose the death penalty. Evidence of abuse can be a powerful mitigator because it can help jurors understand why the defendant acted as he did, and help them evaluate

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[1] This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. All parties have given written consent to the filing of this brief.

whether his level of personal culpability warrants the punishment of death. The reason the evidence is potentially mitigating is *not* because it reassures jurors that the defendant is unlikely to commit dangerous acts in the future; indeed, it may persuade them that he is *more* likely to re-offend because they believe that the effects of the abuse may be permanent or the symptoms may recur.

Similarly, evidence that a defendant had a substantial mental illness at the time of the crime can help jurors evaluate the level of his personal culpability. But if jurors are persuaded by the evidence of his mental illness, they may still conclude that the mental illness makes him more likely to be dangerous in the future.

Given the two-edged nature of child abuse and mental illness evidence, the exclusive focus of the Texas "special issues" system on a defendant's prospective dangerousness places the mitigating significance of that evidence beyond the effective reach of capital jurors.

ARGUMENT

I. THIS COURT HAS LONG RECOGNIZED THE CRITICAL IMPORTANCE OF AFFORDING JURIES A FULL OPPORTUNITY TO CONSIDER AND GIVE WEIGHT TO MITIGATING EVIDENCE IN CAPITAL SENTENCING.

A capital jury's evaluation of relevant facts about a defendant is central to the fairness of the determination of whether the defendant should live or die. As Chief Justice Burger observed nearly three decades ago, the Constitution does not permit states to interfere with sentencers' ability to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion). And the Court has

frequently observed that evidence about a defendant's abuse as a child, and evidence of mental impairment, are particularly "powerful" factors in mitigation. *Wiggins v. Smith*, 539 U.S. 510, 534 (2003). *See Penry v. Lynaugh*, 492 U.S. 302, 337 (1989) ("[V]irtually all of the States with death penalty statutes that list statutory mitigating factors include as a mitigating circumstance evidence that '[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.'"); *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) ("impaired intellectual functioning is inherently mitigating").

States that have the death penalty vary in the precise rules guiding the process by which juries evaluate aggravating and mitigating evidence. But while states may guide the consideration of mitigating evidence, they may neither categorically exclude, nor place out of jurors' effective reach, factors that could inform their understanding of defendant and his actions. *See Johnson v. Texas*, 509 U.S. 350, 372-73 (1993); *Graham v. Collins*, 506 U.S. 461, 475 (1993).

The system adopted by Texas to focus the penalty phase on particular "special issues" has engendered considerable constitutional litigation. This Court has upheld the statute's overall structure, *see Jurek v. Texas*, 428 U.S. 262 (1976), but has insisted that the state cannot impede jurors' consideration of mitigating evidence that its special issues do not reasonably accommodate. *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Penry v. Johnson*, 532 U.S. 782 (2001); *Tennard v. Dretke*, 542 U.S. 274 (2004). In particular, the Court has stressed that the special issues may not provide the jury an adequate vehicle for making the sentencing decision when the defendant's proffered evidence is "a two-edged sword [that] may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Penry v. Lynaugh*, 492 U.S. at 324.

Amici believe that evidence of child abuse and mental illness are similarly two-edged swords.

II. EVIDENCE OF ABUSE AND TRAUMA DURING CHILDHOOD CAN BE POWERFULLY MITIGATING, BUT CONSTITUTES A TWO-EDGED SWORD.

Although there were earlier clinical studies and evaluations, widespread public recognition of the problems and consequences of child abuse developed in the 1970s.[2] This increased awareness led Congress to enact the Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247 (1974), which has been repeatedly expanded and updated and is now codified at 42 U.S.C. § 5101 *et seq.* (Child Abuse Prevention and Treatment and Adoption Act).

As our society's awareness of child abuse and trauma has increased, substantial advances have been made by researchers and clinicians in understanding both the causes and the long-term effects of such injuries. These findings about the effects of abuse and trauma on children, and the effects on their functioning later in life, are particularly relevant to the issue of mitigation evidence in capital trials involving individuals who experienced serious harm as children.

The abuse of children takes many forms.[3] It may involve battering and other physical abuse, severe neglect, emotional mistreatment, or sexual abuse. Far too many children suffer

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[2] *See generally* H.R. Rep. No. 93-685 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2763. *See also The Battered Child* (Ray E. Helfer & C. Henry Kempe eds., 2d ed. 1974).

[3] Sadly, this Court is not unfamiliar with the appalling consequences of the abuse of children. *See DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 191-93 (1989).

abuse that involves more than one of these categories.[4] In addition, children can be drastically affected by traumatic events experienced in their early lives, including such events as the violent deaths of loved ones or extreme emotional neglect.[5]

To appreciate the significance of child abuse in capital sentencing, it is necessary to understand the process of the brain's development and the damage that various forms of abuse can cause.

Development of the Brain

The human brain develops and organizes at an explosive rate in the first years of life. As a result, major childhood events can have an extraordinary and enduring effect. Our scientific understanding of this phenomenon has advanced dramatically in recent decades. In particular, we now

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[4] In one major study, "81% of maltreated child and adolescent subjects reported that they experienced more than one type of maltreatment. Fifty-three percent of these maltreated children experienced at least three types of maltreatment during their lives." Michael D. De Bellis, Elsie R. Broussard et al., *Psychiatric Co-Morbidity in Caregivers and Children Involved in Maltreatment: A Pilot Research Study with Policy Implications*, 25 Child Abuse & Neglect 923, 937 (2001); *see also* Valerie J. Edwards, George W. Holden et al., *Relationship Between Multiple Forms of Childhood Maltreatment and Adult Mental Health in Community Respondents: Results from the Adverse Childhood Experiences Study*, 160 Am. J. Psychiatry 1453 (2003); Howard B. Levy, John Marcovic et al., *Re-Abuse Rates in a Sample of Children Followed for 5 Years After Discharge from a Child Abuse Inpatient Assessment Program*, 19 Child Abuse & Neglect 1363 (1995); Maxia Dong, Robert F. Anda et al., *The Relationship of Exposure to Childhood Sexual Abuse to Other Forms of Abuse, Neglect, and Household Dysfunction During Childhood*, 27 Child Abuse & Neglect 625, 635 (2003) (counseling diagnosticians to be watchful for multiple forms of abuse of the same child).

[5] *See, e.g.*, De Bellis, Broussard et al., *supra* note 4, at 937 ("The majority of maltreated child and adolescent subjects reported that they witnessed domestic violence (85%).").

understand more fully the *physical* and *long lasting* effects of biological and neurological changes in the brain when the child becomes an adult.[6]

This understanding arises from our increased knowledge about the growth and evolution of the brain during childhood. "The period from birth to adulthood is marked by progressive physical, behavioral, cognitive, and emotional development. Paralleling these stages are changes in brain maturation."[7] In normal development, the child's brain begins with the most basic, even primitive, functions and abilities. Starting with the development of the brainstem, the child consolidates basic abilities to alert the nervous system to stimuli, monitor and maintain the basic internal environment of the body (known as homeostasis), and sense events in the child's environment.

This sequential development continues in later months and years, and the child's brain acquires the ability to perform somewhat more complex functions, such as processing (rather than merely experiencing) external stimuli and regulating internal emotional responses.[8] These abilities accompany the development of the lobes of the frontal cortex, the amygdala

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[6] *See* Bruce D. Perry & Ronnie Pollard, *Homeostasis, Stress, Trauma, and Adaptation: A Neurodevelopmental View of Childhood Trauma*, 7 Child & Adolescent Psychiatric Clinics N. Am. 33 (1998).

[7] Michael D. De Bellis, *The Psychobiology of Neglect*, 10 Child Maltreatment 150, 151 (2005). For a general description of the brain's maturation process, see *Mental Health: A Report of the Surgeon General* 32-39 (U.S. Dep't Health & Human Serv. 1999).

[8] Bruce D. Perry, *Neurodevelopmental Impact of Violence in Childhood*, in *Principles and Practice of Child and Adolescent Forensic Psychiatry* 191, 192 (Diane H. Schetky & Elissa P. Benedek eds., American Psychiatric Association 2002). For a particularly helpful explanation of this process, see Adele Diamond, *Normal Development of Prefrontal Cortex from Birth to Young Adulthood: Cognitive Functions, Anatomy and Biochemistry*, in *Principles of Frontal Lobe Function* 466 (Donald T. Stuss & Robert T. Knight eds., Oxford U. Press 2002).

in the center of the brain and other, more advanced, functions. Portions of the mid-brain and the brainstem then acquire the ability to help the higher brain fashion appropriate responses to the environment. As these abilities develop and begin to mature, the child gains more sophisticated skills, allowing him to deal with the outside world and with his own emotional reactions. These developments enable the child to resist impulses and to correct misperceptions of social, as well as potentially threatening, situations.[9]

Unfortunately, this pattern of normal development can be interrupted, arrested, and distorted. And the fact that the child's brain is still developing greatly increases its vulnerability to external threats and harms. "[A]lthough plasticity in the developing brain represents a window of opportunity in normal circumstances, it also represents a period of vulnerability in adverse ones."[10] Different forms of child abuse can transform that vulnerability into lasting damage to the child's mental, emotional, and behavioral development. We now know that those sometimes catastrophic effects can often be traced to physical changes in the brain itself.

The distortions and interruptions of the brain's development that can result from physical trauma and other forms of abuse can have devastating consequences. For example, if the amygdala fails to develop normally, the individual's ability to interpret the emotional expression and communi-

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[9] F. Gerard Moeller, Ernest S. Barratt et al., *Psychiatric Aspects of Impulsivity*, 158 Am. J. Psychiatry 1783, 1785 (2001) ("research has supported the idea that damage to the frontal cortex is a cause of at least some aspects of impulsivity").

[10] Charles A. Nelson & Leslie J. Carver, *The Effects of Stress and Trauma on Brain and Memory: A View from Developmental Cognitive Neuroscience*, 10 Development & Psychopathology 793 (1998); *see* Bruce D. Perry, Ronnie A. Pollard et al., *Childhood Trauma, the Neurobiology of Adaptation, and "Use-Dependent" Development of the Brain: How "States" Become "Traits,"* 16 Infant Mental Health J. 271, 285 (1995).

cation of other people can be diminished.[11] If the development of the brain's synapses is impaired, the individual may have distorted perceptions and reactions throughout his life.[12] If this maturation process is interrupted or stunted during childhood, the individual, as an adult, may grossly misinterpret situations and respond to them in inappropriate and sometimes tragic ways.

An example of such distorted reactions can involve exaggerated perceptions of physical threats from others. As a child experiences normal development, portions of the midbrain and brainstem acquire the ability to evaluate sensory indications of potential dangers. These instantaneous processes allow the individual to process the so-called "fight-or-flight" decisions necessary to both survival and adaptation to living in society.[13] If the development of these areas of the

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[11] *See* Ralph Adolphs, Simon Baron-Cohen & Daniel Tranel, *Impaired Recognition of Social Emotions Following Amygdala Damage*, 14 J. Cognitive Neuroscience 1264 (2002); Bruce S. McEwen, *Early Life Influences on Life-Long Patterns of Behavior and Health*, 9 Mental Retardation & Developmental Disability Research Rev. 149, 150 (2003) ("Past experiences during early life, and states of chemical imbalance associated with depressive illness and post-traumatic stress disorder, can bias the ways in which the amygdala performs these functions.").

[12] *See* Peter R. Huttenlocher, *Synaptogenesis in Human Cerebral Cortex*, in *Human Behavior and the Developing Brain* 137-52 (Geraldine Dawson & Kurt W. Fischer eds., 1994). "The synapse is a dynamic structure. . . . When there is little activity, the synaptic connection will literally dissolve. . . . While somewhat simplistic, it appears that synaptic sculpting is a 'use it or lose it' process. . . . This powerful activity-dependent process appears to be the molecular basis of learning, memory and, therefore, at the core of neurodevelopment." Bruce D. Perry, *Childhood Experience and the Expression of Genetic Potential: What Childhood Neglect Tells Us About Nature and Nurture*, 3 Brain & Mind 79, 85 (2002).

[13] In this process, neural signals tend to increase blood flow to the body's large muscles, "telling" the body that it is under threat and that it must either run away or fight. *See* Paramjit T. Joshi, Peter T. Daniolos &

brain is impaired, a child may fail to acquire the neurodevelopmental skills necessary for normal reactions. "Under traumatic conditions, the body's physiology responds by creating biological patterns in the brain that keep the child on guard or hypervigilant. But the body becomes accustomed to the constantly high levels of this 'fight or flight' biological response, which results in a steady state of hyperarousal. These adaptive symptoms, too, become overgeneralized with time and return unbidden when the adult encounters relatively innocent stimuli. As might well be imagined, adult survivors [of abuse] who are always aroused and vigilant have difficulty controlling their emotions and their actions."[14]

As the following sections will demonstrate, child abuse can cause these distortions in the brain's development. However, the nature of this harm may go unrecognized or misdiagnosed during the individual's childhood. Referring to these processes as a "veiled cascade of events," one recent study noted that "[e]xtreme, traumatic or repetitive childhood stressors such as abuse, witnessing or being the victim of

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Jay A. Salpekar, *Physical Abuse of Children*, in *Textbook of Child and Adolescent Psychiatry* 842 (Jerry M. Wiener et al. eds., 3d ed. 2004).

[14] Barbara Everett & Ruth Gallop, *The Link Between Childhood Trauma and Mental Illness* 27 (2001). *See generally* Deborah A. Weber & Cecil R. Reynolds, *Clinical Perspectives on Neurobiological Effects of Psychological Trauma*, 14 Neuropsychology Rev. 115 (2004); Jeffrey B. Bryer, Bernadette A. Nelson et al., *Childhood Sexual and Physical Abuse as Factors in Adult Psychiatric Illness*, 144 Am. J. Psychiatry 1426 (1987); Bruce D. Perry, *Applying Principles of Neurodevelopment to Clinical Work with Maltreated and Traumatized Children: The Neurosequential Model of Therapeutics*, in *Working with Traumatized Youth in Child Welfare* 27, 34 (Nancy Boyd Webb ed., 2006) ("A young child growing up in a home with pervasive threat, for example, will create a set of associations—primarily precortical and therefore out of his or her conscious awareness—between a host of neutral cues and threat. For the rest of the child's life, these neutral cues will have the capacity to activate a fear response and therefore to alter emotions, behaviors, and physiology.").

domestic violence" are "common, tend to be kept secret, and go unrecognized by the outside world."[15] Sadly, sometimes the damage children suffer is only identified in retrospect. When recognized, even at such a late date, it can help us understand why individuals may have acted as they did. And while not justifying the behavior, that understanding is essential to assessing the level of personal responsibility in deciding whether a capital defendant is to live or die.

Stress and PTSD

In medicine, "stress" is something of a term of art. In its ordinary-language sense, "stress" means the pressures and challenges that are part of all of our (including children's) lives. While confronting stress in this sense is difficult, it is also essential for growth and development. Indeed, if a young child does *not* confront a succession of challenging events, the process of neurological development and learning can be stunted. In that sense, stress is both normal and indispensable.

But when physicians use the term stress regarding pathologies (as in "posttraumatic stress disorder"[16] or "PTSD") they are referring to stressors that exceed what the brain can handle at a particular stage of life. "[S]tress is something in

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[15] Robert F. Anda, Vincent J. Felitti et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood: A Convergence of Evidence from Neurobiology and Epidemiolgy*, 256 Eur. Archives Psychiatry & Clinical Neuroscience 174, 180 (2006). "Likewise, the fight-or-flight response among children exposed to these types of stressors, and the attendant release of endogenous catecholamines and adrenal corticosteroids are both uncontrollable and invisible." *Id.* In a sense, this "cascade" of life events mirrors the "cascade model" of neurobiological events that follow traumatic stressors on a child's brain. *See* Martin H. Teicher, Susan L. Andersen et al., *Developmental Neurobiology of Childhood Stress and Trauma*, 25 Psychiatric Clinics N. Am. 397, 400 (2002).

[16] For a fuller discussion of PTSD, *see infra* p.17.

the environment that might disrupt or change the normal functioning of an individual, including his or her very assumptions about the nature of the world and the self. Trauma involves stress that is more severe than and exceeds normal human resources for coping."[17]

Not surprisingly, the disruptions of brain function caused by child abuse produce a very high incidence of mental illness in children.[18] Such stressors can also have a substantial impact on a child's behavior.[19] For example, "[a]s

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[17] Nelson & Carver, *supra* note 10, at 801; *see also* Michael D. De Bellis, Andrew S. Baum et al., *Developmental Traumatology Part I: Biological Stress Systems*, 45 Biological Psychiatry 1259 (1999). For an overview of the biological research, drawing from both human and animal studies, see J. Douglas Bremner & Eric Vermetten, *Stress and Development: Behavioral and Biological Consequences*, 13 Development & Psychopathology 473 (2001). On the characteristics of stress, see generally Michael Gelder, Dennis Gath et al., *Oxford Textbook of Psychiatry* 76 (3d ed. 1996).

[18] *See* Sandra J. Kaplan, David Pelcovitz & Victor Labruna, *Child and Adolescent Abuse and Neglect Research: A Review of the Past 10 Years, Part I: Physical and Emotional Abuse and Neglect*, 38 J. Am. Acad. Child & Adolescent Psychiatry 1214, 1217 (1999). Indeed, there has been a suggestion that the similarity of symptoms between PTSD and other forms of mental illness may lead to confused diagnoses that underreport the incidence of PTSD. *See* Richard Famularo, Robert Kinscherff & Terence Fenton, *Posttraumatic Stress Disorder Among Children Clinically Diagnosed as Borderline Personality Disorder*, 179 J. Nervous & Mental Disease 428, 430 (1991). Among the mental illnesses reported, clinical depression is one of the most widespread among the victims of early childhood stressors. Thaddeus W.W. Pace, Tanja C. Mletzko et al., *Increased Stress-Induced Inflammatory Responses in Male Patients with Major Depression and Increased Early Life Stress*, 163 Am. J. Psychiatry 1630 (2006); Joan Kaufman & Dennis Charney, *Effects of Early Stress on Brain Structure and Function: Implications for Understanding the Relationship Between Child Maltreatment and Depression*, 13 Development & Psychopathology 451 (2001).

[19] Seth Pollak, Dante Cicchetti & Rafael Klorman, *Stress, Memory, and Emotion: Developmental Considerations from the Study of Child Mal-*

a group, individuals with histories of [child sexual abuse], irrespective of their psychiatric diagnosis, manifest significant problems with affect regulation, impulse control, somatization, sense of self, cognitive distortions, and problems with socialization. Many of these processes are believed to have developmentally sensitive neuronal and behavioral periods related to brain maturation and early caretaker interactions."[20]

Physical Abuse and Brain Injuries

Physical injury, particularly traumatic brain injuries (TBI), can have a substantial and adverse effect on a child's neurological development.[21] Such brain injuries can befall children from a variety of causes, including those that are intentionally

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treatment, 10 Development & Psychopathology 811, 822 (1998) ("[L]ack of flexibility in the regulation of emotion would likely create a mismatch between action and situation, and result in inappropriate behavioral responses. This latter description better characterizes the kinds of problems observed with maltreated children."); *see also* Catherine C. Ayoub, Erin O'Connor et al., *Cognitive and Emotional Differences in Young Maltreated Children: A Translational Application of Dynamic Skill Theory*, 18 Development & Psychopathology 679, 683 (2006) (if "maltreatment is recurrent, which it often is, then these traumatogenic responses become habitual and generalized").

[20] Frank W. Putnam, *Ten-Year Research Update Review: Child Sexual Abuse*, 42 J. Am. Acad. Child & Adolescent Psychiatry 269, 273 (2003) (citation omitted); *see also* Michael D. De Bellis, Matcheri S. Keshavan et al., *Developmental Traumatology Part II: Brain Development*, 45 Biological Psychiatry 1271, 1278-79 (1999). *See generally* Jan Volavka, *The Neurobiology of Violence: An Update*, 11 J. Neuropsychiatry & Clinical Neurosciences 307 (1999).

[21] *See generally* National Institutes of Health, *Rehabilitation of Persons with Traumatic Brain Injury*, 282 JAMA 974 (Consensus Development Panel 1999); Jean A. Langlois, Wesley Rutland-Brown et al., *The Epidemiology and Impact of Traumatic Brain Injury*, 21 J. Head Trauma Rehabilitation 375 (2006).

inflicted and those that are accidental.[22] Apparently those children whose brain injuries are deliberately inflicted, such as the victims of child abuse, may suffer more serious consequences than children whose injuries are accidental.[23] While it is well recognized that such injuries have a substantial impact on the functioning of adult brains,[24] the developmental effects on children's brains are now becoming more fully understood.[25] In addition to adverse effects on a

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[22] *See* Heather T. Keenan, Desmond K. Runyan et al., *A Population-Based Comparison of Clinical and Outcome Characteristics of Young Children with Serious Inflicted and Noninflicted Traumatic Brain Injury*, 114 Pediatrics 633 (2004). It appears that such injuries occur more frequently to boys than to girls. Samuel R. Reid, Jon S. Roesler et al., *The Epidemiology of Pediatric Traumatic Brain Injury in Minnesota*, 155 Archives Pediatrics & Adolescent Med. 784, 785 (2001).

[23] *See* Linda Ewing-Cobbs, Larry Kramer et al., *Neuroimaging, Physical, and Developmental Findings After Inflicted and Noninflicted Traumatic Brain Injury in Young Children*, 102 Pediatrics 300, 304 (1998) ("Children with inflicted and noninflicted TBI had different patterns of neuroimaging, physical, and cognitive findings. Although both groups had negative histories of previous brain injury, signs of preexisting brain injury . . . were apparent in 40% to 45% of children with inflicted TBI and in none of the children with noninflicted injuries."); Heather T. Keenan, Desmond K. Runyan & Maryalice Nocera, *Child Outcomes and Family Characteristics 1 Year After Severe Inflicted or Noninflicted Traumatic Brain Injury*, 117 Pediatrics 317, 321 (2006); Carla DiScala, Robert Sege et al., *Child Abuse and Unintentional Injuries: A 10-Year Retrospective*, 154 Archives Pediatrics & Adolescent Med. 16 (2000) ("children who were abused developed extensive functional limitations more frequently than those unintentionally injured").

[24] *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 164 (4th ed., text rev. 2000) [hereinafter "DSM-IV-TR"] (Dementia Due to Head Trauma). For an explanation of this process in adults, with particular emphasis on physiological and anatomical harm to the brain, see Erin D. Bigler, Carol V. Anderson & Duane D. Blatter, *Temporal Lobe Morphology in Normal Aging and Traumatic Brain Injury*, 23 Am. J. Neuroradiology 255 (2002).

[25] *See, e.g.*, Keenan, Runyan & Nocera, *supra* note 23, at 318 ("Although it was once thought that the plasticity of the infant brain

variety of measures of health,[26] such injuries can produce cognitive impairment, impede learning, and result in reduced measured intelligence.[27]

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would allow very young children to compensate for injuries, that premise has been brought into question. Surviving children may be faced with lifelong impairments in multiple areas of functioning."); Vicki Anderson, Cathy Catroppa et al., *Functional Plasticity or Vulnerability After Early Brain Injury?*, 116 Pediatrics 1374 (2005) ("Despite the commonly held view that young children's brains are able to adapt to the impact of severe insults, clinical reports indicate that residual problems occur in a range of skills, including intellectual ability, attention, and memory.").

[26] Beth S. Slomine, Melissa L. McCarthy et al., *Health Care Utilization and Needs After Pediatric Traumatic Brain Injury*, 117 Pediatrics 663 (2006) (reporting the damage TBI can inflict and its impact in worsening pre-existing problems). *See generally* Ricardo E. Jorge, *Neuropsychiatric Consequences of Traumatic Brain Injury: A Review of Recent Findings*, 18 Current Opinion in Psychiatry 289 (2005).

[27] *See* American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 128-30 (10th ed. 2002). There are strong indications that injuries in the early, formative years of brain development produce more significant and lasting reduction in cognitive functioning and IQ. *See* DSM-IV-TR at 151 (dementia is relatively uncommon among children, but can be caused by head injury). *See generally* Melissa L. McCarthy, Ellen J. MacKenzie et al., *Health-Related Quality of Life During the First Year After Traumatic Brain Injury*, 160 Archives Pediatrics & Adolescent Med. 252, 256 (2006) (reporting that the extent of cognitive impairment correlated with extent of the brain injury). *See, e.g.*, Anderson, Catroppa et al., *supra* note 25, at 1380-81. *But see* Linda Ewing-Cobbs, Marcia Barnes et al., *Modeling Longitudinal Academic Achievement Scores After Pediatric Traumatic Brain Injury*, 25 Developmental Neuropsychology 107, 126-27 (2004) (suggesting more significant reduction for younger TBI victims' academic performance in arithmetical skills than for reading comprehension). This latter result appears consistent with the finding of performance deficits among children with PTSD on a variety of measures, including attention, and abstract reasoning and executive function, but not in language skills or psychomotor speed. Sue R. Beers & Michael D. De Bellis, *Neuropsychological Function in Children with Maltreatment-Related Posttraumatic Stress Disorder*, 159 Am. J. Psychiatry 483, 485 (2002). These differential results appear consistent with the conclusion that the

Childhood brain injuries can also alter the individual's personality both in childhood and in adult life.[28] And these injuries have been strongly statistically correlated with behavioral[29] problems in adulthood,[30] particularly impulsivity,[31] as well as alcohol and drug abuse.[32] Such personality

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cognitive impact of childhood PTSD involves specific brain functions, rather than merely a generalized diminution in overall performance.

[28] *See, e.g.*, Jeffrey Edwin Max, Brigette Anna Marie Robertson et al., *The Phenomenology of Personality Change Due to Traumatic Brain Injury in Children and Adolescents*, 13 J. Neuropsychiatry & Clinical Neurosciences 161, 164-65 (2001) (reporting, inter alia, increased aggressivity and impaired social judgment in roughly 40% of children studied); Jeffrey E. Max, Harvey S. Levine et al., *Predictors of Personality Change Due to Traumatic Brain Injury in Children and Adolescents Six to Twenty-Four Months After Injury*, 18 J. Neuropsychiatry & Clinical Neurosciences 21, 30 (2006) (reporting the persistence of personality change in childhood and the significance of frontal lobe lesions in the severity of the personality change). *See generally* DSM-IV-TR at 188 (personality change due to head trauma, particularly injury to the frontal lobes).

[29] *See, e.g.*, Michael Sarapata, Douglas Herrmann et al., *The Role of Head Injury in Cognitive Functioning, Emotional Adjustment and Criminal Behavior*, 12 Brain Injury 821 (1998).

[30] *See* Wade C. Myers, Kerrilyn Scott et al., *Psychopathology, Biopsychosocial Factors, Crime Characteristics, and Classification of 25 Homicidal Youths*, 34 J. Am. Acad. Child & Adolescent Psychiatry 1483, 1485 (1995) (reporting that the most frequent medical condition in the subjects' histories was "serious head trauma").

[31] *See* Moeller, Barratt et al., *supra* note 9, at 1785.

[32] *See, e.g.*, Ricardo E. Jorge, Sergio E. Sarkstein et al., *Alcohol Misuse and Mood Disorders Following Traumatic Brain Injury*, 62 Archives Gen. Psychiatry 742 (2006); Michael David Horner, Pamela L. Ferguson et al., *Patterns of Alcohol Use 1 Year After Traumatic Brain Injury: A Population-Based, Epidemiological Study*, 11 J. Int'l Neuropsychol. Soc. 322 (2005); Karen Heffernan, Marylene Cloitre et al., *Childhood Trauma as a Correlate of Lifetime Opiate Use in Psychiatric Patients*, 25 Addictive Behaviors 797 (2000); *cf.* Michael D. De Bellis, *Developmental Traumatology: A Contributory Mechanism for Alcohol and Substance Abuse Disorders*, 27 Psychoneuroendocrinology 155, 158 (2002)

changes in children often constitute clinically recognized mental illness, and the mental illness, as well as its behavioral consequences, can endure into adulthood.

Mental illness that results from traumatic brain injury may show up in the immediate aftermath of the injury.[33] In other cases, the symptoms do not manifest themselves until some years later.[34] And while other psychiatric disorders are strongly associated with brain injury, particularly affective disorders like major depression,[35] the strongest correlation may be with posttraumatic stress disorder (PTSD).[36] The American Psychiatric Association defines PTSD as:

(indicating that adult victims of child abuse with mental illness may use alcohol to alleviate psychiatric symptoms).

[33] *See, e.g.*, Jeffrey E. Max, Donald A. Robin et al., *Traumatic Brain Injury in Children and Adolescents: Psychiatric Disorders at One Year*, 10 J. Neuropsychiatry 290 (1998).

[34] *See* Daryl Fujii & Iqbal Ahmed, *Characteristics of Psychotic Disorder Due to Traumatic Brain Injury: An Analysis of Case Studies in the Literature*, 14 J. Neuropsychiatry & Clinical Neurosciences 130, 131 (2002) and sources cited therein (reporting that a majority of TBI subjects who developed psychotic symptoms experienced delayed onset).

[35] *See, e.g.*, Ricardo E. Jorge, Robert G. Robinson et al., *Major Depression Following Traumatic Brain Injury*, 61 Archives Gen. Psychiatry 42 (2004) (reporting strong relationship to major depression and the occurrence of aggressive behavior), and sources cited therein.

[36] Amanda E. Guyer, Joan Kaufman et al., *Behavioral Alterations in Reward System Function: The Role of Childhood Maltreatment and Psychopathology*, 45 J. Am. Acad. Child & Adolescent Psychiatry 1059, 1060 (2006); Michael D. De Bellis, *Developmental Traumatology: The Psychobiological Development of Maltreated Children and Its Implications for Research, Treatment, and Policy*, 13 Development & Psychopathology 539, 541 (2001) ("Chronic PTSD symptoms may provide the mechanisms for the pervasive psychopathology seen in maltreated children."); *see* Robert van Reekum, Tammy Cohen & Jenny Wong, *Can Traumatic Brain Injury Cause Psychiatric Disorders?*, 12 J. Neuropsychiatry & Clinical Neurosciences 316, 323-24 (2000); Jorge, *supra* note 26, at 292.

> [T]he development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate.

DSM-IV-TR at 463.[37] It is now clear that children can and do suffer from PTSD.[38]

Recent studies have made clear that the phenomenon of PTSD in children has a physical manifestation. For example, in a widely cited study, researchers compared the MRI brain images of children who had experienced abuse-related PTSD with those of a control group. The study found that "subjects with maltreatment-related PTSD had smaller intercranial, cerebral, and prefrontal cortex volumes, prefrontal cortical white matter and right temporal lobe volumes" when compared to non-abused control subjects.[39] In addition, stressors

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[37] "For children, sexually traumatic events may include developmentally inappropriate sexual experiences without threatened or actual violence or injury. Witnessed events include, but are not limited to, observing the serious injury or unnatural death of another person due to violent assault, accident, war, or disaster or unexpectedly witnessing a dead body or body parts. . . . The disorder may be especially severe or long lasting when the stressor is of human design (e.g., torture, rape). The likelihood of developing this disorder may increase as the intensity of and physical proximity to the stressor increase." DSM-IV-TR at 464. (The DSM's classification number for PTSD is 309.81.)

[38] *See, e.g.*, Michael S. Scheeringa, Charles H. Zeanah et al., *Two Approaches to the Diagnosis of Posttraumatic Stress Disorder in Infancy and Early Childhood*, 34 J. Am. Acad. Child & Adolescent Psychiatry 191 (1995).

[39] Michael D. De Bellis, Matcheri S. Keshavan et al., *Brain Structures in Pediatric Maltreatment-Related Posttraumatic Stress Disorder: A*

in the lives of children have also been observed and measured in children's limbic systems and in abnormalities in their EEGs.[40]

The damage caused by PTSD can be directly relevant to questions involving mitigation in capital cases[41] and can be crucial in helping jurors understand a defendant's behavior that may otherwise be inexplicable. Even more importantly, an understanding of PTSD can assist members of the jury in recognizing a defendant's actions as a consequence of a

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Sociodemographically Matched Study, 52 Biological Psychiatry 1066, 1070 (2002); *see id.* at 1073 ("The positive correlations between intracranial and cerebral volumes with age of onset of PTSD trauma and negative correlations with duration of PTSD trauma suggests that traumatic childhood experiences may adversely influence brain development."). The researchers also found gender differences in the impact of PTSD in children. "Our findings may suggest that boys may be more vulnerable to the effects of severe stress on brain development than girls. This vulnerability may lead to decreased adult resilience. Thus, being male may constitute a neurobiologic risk marker for stress-related vulnerability for adverse brain development during childhood." *Id.* at 1075. *But see* Meena Vythilingam, Christine Heim et al., *Childhood Trauma Associated with Smaller Hippocampal Volume in Women with Major Depression*, 159 Am. J. Psychiatry 2072 (2002). A more recent study found abuse-related size differences in the cerebellum. Michael D. De Bellis & Maragatha Kuchibhatla, *Cerebellar Volumes in Pediatric Maltreatment-Related Posttraumatic Stress Disorder*, 60 Biological Psychiatry 697 (2006).

[40] Teicher, Andersen et al., *supra* note 15, at 404; *see also* Yutaka Ito, Martin H. Teicher et al., *Preliminary Evidence for Aberrant Cortical Development in Abused Children: A Quantitative EEG Study*, 10 J. Neuropsychiatry & Clinical Neurosciences 298 (1998).

[41] The list of the "constellation of symptoms" that are "more commonly seen in association with an interpersonal stressor (e.g., childhood sexual or physical abuse, domestic battering)" includes "impaired affect modulation; self-destructive and impulsive behavior; . . . social withdrawal; feeling constantly threatened; impaired relationships with others; [and] a change from the individual's previous personality characteristics." DSM-IV-TR at 465.

serious mental disorder. This knowledge is beyond the ken of the average juror and would dispel the false impression of a different, criminal motivation.

The developmental consequences of physical abuse of a child extend beyond the specific physical results of traumatic brain injury. Abundant evidence also shows that the nature of a physically abusive relationship can have lasting adverse consequences on the child later in life. It is now widely accepted that a relationship characterized by physical abuse disrupts and distorts the child's cognitive, emotional, and social development.[42]

Severe Neglect

Like traumatic brain injury, severe neglect can stunt the neurological development of children and negatively affect

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[42] "Abuse diminishes the social and emotional support necessary for accomplishing the major developmental milestones in children's lives." Suzanne Salzinger, Richard S. Feldman et al., *The Effect of Physical Abuse on Children's Social and Affective Status: A Model of Cognitive and Behavioral Processes Explaining the Association*, 13 Development & Psychopathology 805 (2001).

Of course, not every child who suffers abuse manifests the same psychopathology and behavioral consequences. *See generally* Jean Marie McGloin & Cathy Spatz Widom, *Resilience Among Abused and Neglected Children Grown Up*, 13 Development & Psychopathology 1021, 1035 (2001) (reporting 22% of the sample of abused children did not manifest the mental health and behavioral consequences "despite the major stresses and risk posed by their earlier childhood experiences," and noting that there was somewhat greater incidence of resilience among females in the sample than among males). Factors that produce this atypical result in a minority of abuse victims are not fully understood. *See generally* Ann S. Masten, Jon J. Hubbard et al., *Competence in the Context of Adversity: Pathways to Resilience and Maladaptation from Childhood to Late Adolescence*, 11 Development & Psychopathology 143 (1999).

their functioning and behavior as adults.[43] The emotional and developmental harm suffered by children who are subjected to grave neglect has long been recognized in the clinical literature.[44] Recent studies have made clear that the resulting damage to such children can extend beyond emotional responses.[45] Neglected children experience substantially delayed cognitive development, and deficits in both academic achievement and IQ.[46]

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[43] Child neglect is defined as "failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm" or "an act or failure to act which presents an imminent risk of serious harm." 42 U.S.C. § 5106(g) (2000). It is estimated that child neglect constitutes roughly 60% of the reported cases of child abuse. U.S. Department of Health and Human Services, *Child Maltreatment 2002: Reports from the States to the National Child Abuse and Neglect Data System* xiv (2002).

[44] *See, e.g.*, Henry Dwight Chapin, *Systematized Boarding Out vs. Institutional Care for Infants and Young Children*, 105 N.Y. Med. J. 1009, 1011 (1917); Harry T. Chugani, Michael E. Behen et al., *Local Brain Functional Activity Following Early Deprivation: A Study of Post-Institutionalized Romanian Orphans*, 14 Neuroimage 1290 (2001) (reporting dramatic effects revealed by MRI imaging); Michael Rutter, Lucie Andersen-Wood et al., *Quasi-Autistic Patterns Following Severe Early Global Privation*, 40 J. Child Psychology & Psychiatry 537 (1999) (Romanian orphanages); Wayne Dennis, *Children of the Crèche* (1973) (Lebanese orphanage). *See also* DSM-IV-TR at 128 ("Extreme neglect—and especially institutional care with limited opportunities to form selective attachments—increases the risk of developing [Reactive Attachment Disorder].").

[45] "[T]he child exposed to chaotic or threatening caregiving develops a sensitized stress-response system that affects arousal, emotional regulation, behavioral reactivity, and even cardiovascular regulation. These sensitized children are at risk for stress-induced neuropsychiatric problems later in life." Perry & Pollard, *supra* note 6, at 40 (citations omitted).

[46] Cynthia M. Perez & Cathy Spatz Widom, *Childhood Victimization and Long-Term Intellectual and Academic Outcomes*, 18 Child Abuse & Neglect 617, 626 (1994) ("child abuse and neglect represent significant risk factors for poor long-term intellectual and academic outcomes"); *id.*

Severely neglected children are also at increased risk for substantial mental illness.[47] While some of the mental illness traces to purely psychological causes, the evidence strongly indicates that many of the mental health symptoms and learning problems associated with child neglect arise from the biological effects of stress.[48] "Disruptions of experience-dependent critical neurochemical signals during early life may lead to major abnormalities or deficits in neuro-development. Disruption of critical neuro-developmental cues can result from (1) lack of sensory experience during sensitive periods (e.g., neglect) or (2) atypical or abnormal patterns of necessary cues due to extremes of experience (e.g., traumatic stress)."[49]

Sexual and Emotional Abuse

Similarly, emotional and sexual abuse of children can have lasting, and tragic, consequences. The harms of sexual abuse are well documented.[50] But modern research is revealing that the same neurobiological processes that render traumatic brain injuries and severe neglect so damaging to children can

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at 624 ("the decreased intellectual functioning observed in the abused and/or neglected subjects in young adulthood remained significant despite controls for economic status and other variables"); *see id.* at 630-32 (citing to clinical literature). *See also* Kaplan, Pelcovitz & Labruna, *supra* note 18, at 1216; Shanta R. Dube, Vincent J. Felitti et al., *The Impact of Adverse Childhood Experiences on Health Problems: Evidence from Four Birth Cohorts Dating Back to 1900*, 37 Preventive Medicine 268 (2003).

[47] *See, e.g.*, DSM-IV-TR at 96 (parental neglect, rejection, and other forms of abuse may predispose children for conduct disorder).

[48] De Bellis, *supra* note 7, at 155-64.

[49] Perry, *supra* note 12, at 87 (citation omitted).

[50] *See, e.g.*, Cheryl Lanktree, John Briere & Lisa Zaidi, *Incidence and Impact of Sexual Abuse in a Child Outpatient Sample: The Role of Direct Inquiry*, 15 Child Abuse & Neglect 447 (1991); Angela Brown & David Finkelhor, *Impact of Child Sexual Abuse: A Review of the Research*, 99 Psychological Bulletin 66 (1986).

also result from sexual abuse.[51] As with other forms of child abuse, the damaging effects of sexual abuse are not always immediately apparent; sometimes they only appear months or years later.[52] Predicting which children will have such delayed reactions, known as "sleeper effects,"[53] has proven difficult.[54] Sometimes the damage goes undetected until the individual becomes an adult.

While our society now widely recognizes the harm caused by sexual abuse of children, there is, perhaps, a tendency to minimize the consequences of sustained, severe verbal abuse and other forms of substantial psychological injury. But particularly when it accompanies other types of abuse, verbal abuse can have comparably serious consequences for the child. For example, one study found that "[c]ombined exposure to verbal abuse and witnessing of domestic violence

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[51] Christine Heim, D. Jeffrey Newport et al., *Altered Pituitary-Adrenal Axis Responses to Provocative Challenge Tests in Adult Survivors of Childhood Abuse*, 158 Am. J. Psychiatry 575 (2001); *see* Frank W. Putnam & Penelope K. Trickett, *Psychobiological Effects of Sexual Abuse: A Longitudinal Study*, 821 Annals N.Y. Acad. Sci. 150, 157-58 (1997); Dong, Anda et al., *supra* note 4, at 633-35 (reporting results consistent with neuropsychiatric studies of other forms of abuse).

[52] "When evaluated with standard instruments, up to 40% of sexually abused children may present with few or no symptoms. A number of reasons have been offered including the possibility that asymptomatic children had minor abuse, that they are more resilient, or that they have a coping style that masks their distress." Putnam, *supra* note 20, at 274 (citations omitted). *See also* Karen J. Saywitz, Anthony P. Mannarino et al., *Treatment for Sexually Abused Children and Adolescents*, in *Annual Progress in Child Psychiatry and Child Development* 455, 457 (Margaret E. Hertzig & Ellen A. Farber eds., 2003).

[53] Putnam, *supra* note 20, at 274.

[54] Jennifer Tebbutt, Heather Swanston et al., *Five Years After Child Sexual Abuse: Persisting Dysfunction and Problems of Prediction*, 36 J. Am. Acad. Child & Adolescent Psychiatry 330, 337-38 (1997) (family environment and abuse-related variables have not proven to be good predictors of long-term mental problems).

was associated with extraordinarily large adverse effects, particularly on dissociation. This finding is consonant with studies that suggest that emotional abuse may be a more important precursor of dissociation than is sexual abuse."[55]

Mental Illness and Disability Resulting from Abuse

The physiological effects of child abuse are often permanent and can continue into adulthood, with serious consequences for perception, functioning, and behavior. The persistence of the effects of childhood abuse is well-documented in the area of mental illness.[56] This is particularly true for PTSD. "Even if childhood trauma does not result in childhood PTSD, it increases the risk for adult PTSD and adult psychiatric illness."[57] An all-too-frequently encountered pattern is that of individuals who had been abused as children later committing acts of abuse as adults.[58]

Another consequence of childhood abuse or traumatization can be a reduction in the individual's intellectual abilities and intelligence. The clearest and most obvious example is when the child suffers a traumatic brain injury during the de-

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[55] Martin H. Teicher, Jacqueline A. Samson et al., *Sticks, Stones, and Hurtful Words: Relative Effects of Various Forms of Childhood Maltreatment*, 163 Am. J. Psychiatry 993, 997 (2006); *see also id.* at 998 ("Combined exposure to different categories of abusive experiences often equaled or exceeded the impact of exposure to familial sexual abuse. This is of great importance as it suggests that combined exposure to less blatant forms of abuse may be just as deleterious as the most egregious acts we confront.").

[56] *See* Kaplan, Pelcovitz & Labruna, *supra* note 18, at 1217-18.

[57] De Bellis, *supra* note 36, at 543 (citations omitted); *see* Anda, Felitti et al., *supra* note 15, at 180.

[58] *See* Katherine C. Pears & Deborah M. Capaldi, *Intergenerational Transmission of Abuse: A Two-Generational Prospective Study of an At-Risk Sample*, 25 Child Abuse & Neglect 1439 (2001). *See generally* De Bellis, Broussard et al., *supra* note 4.

velopmental period.[59] A brain injury during development can adversely affect the child's ability to learn and process information.

Modern research has confirmed the perhaps less obvious conclusion that the same sort of reduced intellectual ability can result from non-physical injury, such as PTSD.[60] The physical character of this reduced cerebral ability is shown in studies that demonstrate that children who suffer PTSD during key developmental periods may, as a result, actually have smaller brain mass.[61] In some cases, the impact of PTSD can be identified in physical imaging of the individual's brain.[62]

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[59] *See* Boris Birmaher & Daniel T. Williams, *30 Acquired Brain Disorders*, in *Child and Adolescent Psychiatry: A Comprehensive Textbook* 371-72 (Melvin Lewis ed., 2d ed. 1991). *See generally* McCarthy, MacKenzie et al., *supra* note 27, at 256 (reporting that the extent of cognitive impairment correlated with extent of the brain injury).

[60] *See* Joshi, Daniolos & Salpekar, *supra* note 13, at 842; Perez & Widom, *supra* note 46, and sources cited therein.

[61] *See, e.g.*, Victor G. Carrion, Carl F. Weems et al., *Attenuation of Frontal Asymmetry in Pediatric Posttraumatic Stress Disorder*, 50 Biological Psychiatry 943, 948 (2001) ("Our results indicate that children with a history of exposure to trauma and with resulting posttraumatic stress symptoms had significantly smaller total brain and cerebral volumes than an age- and gender-matched healthy control group."); J. Douglas Bremner, *Long-Term Effects of Childhood Abuse on Brain and Neurobiology*, 12 Child & Adolescent Psychiatric Clinics N. Am. 271, 279 (2003) (reporting several studies finding reduced hippocampal volume (areas involving new learning and memory) in the brains of abused children). *See also* De Bellis, Keshavan et al., *supra* note 20, at 1278-79; Kaufman & Charney, *supra* note 18, at 462 ("the children and adolescents with PTSD were found to have smaller intracranial and cerebral volumes than matched controls, increased right, left, and total lateral ventrical volume; and decreased volume of the medial and posterior portions of the corpus callosum") (citation omitted).

[62] Beers & De Bellis, *supra* note 27, at 483.

A defendant's history of child abuse and any resulting mental problems are exactly the kind of evidence that jurors could find powerfully mitigating. This evidence helps explain why a defendant acted as he did. But there is nothing about it that categorically demonstrates that the defendant is less likely to be dangerous in the future. Indeed, jurors might well conclude that the neurological permanence of the injury could make it *more* likely that the defendant would re-offend. Therefore the question about future dangerousness is not an adequate vehicle for evaluating the *mitigating* significance of a defendant's mental condition.

III. EVIDENCE OF A CAPITAL DEFENDANT'S MENTAL ILLNESS ALSO CONSTITUTES A TWO-EDGED SWORD.

Just as mental illness that results from child abuse is a mitigating factor that is beyond the effective reach of jurors under the Texas system, so, too, is a defendant's mental illness, regardless of its etiology or age of onset.

The mitigating significance of mental illness is well-established. The relevance of mental illness is reflected in the fact that virtually all states that list statutory mitigating factors include a defendant's mental condition as a mitigating circumstance. *Penry v. Lynaugh*, 492 U.S. at 337 (opinion of O'Connor, J.). Nonetheless, Texas jurors are faced with the conundrum of how to consider its true mitigating effect within the confines of the question about prospective dangerousness.

Evidence of a defendant's mental illness may well be deemed relevant to his future dangerousness, but it may be seen as relevant because it renders him *more* dangerous, rather than less.

Public perceptions of mental illness change over time, but the change is not unidirectional. While there appears to be a

somewhat greater general public acceptance of people with mental illness in recent decades, it has not been accompanied by reduced fear of the dangerousness they may be thought to pose. Indeed, the available evidence suggests that the fear of future dangerousness from people with mental illness, particularly psychotic conditions, has actually *increased.*[63]

The fear, often exaggerated fear,[64] that jurors may harbor about the effect of a defendant's mental illness on his future dangerousness surely makes evidence of that illness just the kind of two-edged sword that the special issues cannot reasonably be thought to accommodate.

Nor can mental illness be equated with a defendant's youth in the context of a prediction about future dangerousness. A central attribute of a defendant's young age is that he will

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[63] Jo C. Phelan, Bruce G. Link et al., *Public Conceptions of Mental Illness in 1950 and 1996: What Is Mental Illness and Is It to be Feared?*, 41 J. Health & Social Behav. 188, 202 (2000) ("Perceptions that such people are dangerous increased nearly two and a half times since 1950 to a point that, in 1996, nearly one-third of respondents spontaneously volunteered the idea that psychotic persons may be violent."); *see also* Bernice A. Pescosolido, John Monahan et al., *The Public's View of the Competence, Dangerousness, and Need for Legal Coercion of Persons with Mental Health Problems*, 89 Am. J. Pub. Health 1339, 1341 (1999) ("Americans continue to discriminate among different types of mental health problems regarding dangerousness. However, levels of concern are high."); Patrick W. Corrigan & Amy E. Cooper, *Mental Illness and Dangerousness* 165-79 (Patrick W. Corrigan ed., American Psychological Association 2005). On the role of media portrayals in shaping public perceptions, see Otto F. Wahl, *Media Madness: Public Images of Mental Illness* 56-86 (1995).

[64] For a more realistic assessment, see Jeffrey W. Swanson, *Mental Disorder, Substance Abuse, and Community Violence: An Epidemiological Approach*, in *Violence and Mental Disorder: Developments in Risk Assessment* 101-36 (John Monahan & Henry J. Steadman eds., 1994).

predictably and inevitably get older.[65] The characteristics of mental illnesses are quite different. While mental illnesses differ from one another, their alleviation is seldom predictably inevitable. Our scientific and clinical understanding of the recurring, and sometimes intractable, nature of many forms of mental illness is growing.[66] That increased knowledge can help us treat many patients more effectively, and it also helps us understand more fully why some of them commit otherwise inexplicable criminal acts. But it does not, by itself, automatically reassure us about their future condition or actions.

Although the public's fears about prospective dangerousness are often exaggerated, we cannot expect jurors to give fair consideration to mental health evidence if they can only express their understanding of its mitigating role in defendant's criminal acts by deciding that the defendant represents no future danger.

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[65] *See Johnson v. Texas*, 509 U.S. at 368 ("the signature qualities of youth are transient").

[66] In recent years, researchers have come to appreciate the substantial role that physical causes play in the etiology of many mental illnesses. As recently as a few decades ago, leading texts treated that role as inconsequential. *See, e.g.*, C. Knight Aldrich, *An Introduction to Dynamic Psychiatry* 29-30 (1966) ("The possibility of an exclusively physical cause for psychiatric illness is appealing to both physician and patient. . . . So far, however, the evidence for a physical cause or even a major physical causative factor is rather skimpy in most psychiatric illness and virtually nonexistent in many others."). Scientific advances in brain imaging, psychopharmacology, and other fields have made clear that physical causes are far more significant than previously believed. *See, e.g.*, Joseph T. Coyle & Steven E. Hyman, *The Neuroscientific Foundations of Psychiatry*, in *Textbook of Psychiatry* 3-33 (Robert E. Hales, Stuart C. Yudofsky & John A. Talbott eds., 3d ed. 1999); Michael R. Trimble, *Biological Psychiatry* (2d ed. 1996); James G. Hollandsworth, Jr., *The Physiology of Psychological Disorders: Schizophrenia, Depression, Anxiety, and Substance Abuse* (1990); Gelder, Gath et al., *supra* note 17, at 84-103.

CONCLUSION

For the reasons set forth above, *amici* urge this Court to reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

The American Academy of Child and Adolescent Psychiatry (AACAP) is a non-profit organization whose membership includes over 7,400 child and adult psychiatrists. Established in 1953, the AACAP is the leading national medical association dedicated to treating the myriad mental, behavioral, and developmental disorders suffered by an estimated seven to twelve million American youth. The AACAP strives to improve the quality of life of the children and families subjected to these disorders by providing universal access to care for all children and adolescents, expanding research programs for prevention and treatment of mental illness, and providing other integrated services that meet the needs of the affected children and their families in a community setting. The AACAP is committed to protecting the well-being and rights of the children and families whose lives are affected by these disorders.

The American Association on Intellectual and Developmental Disabilities (AAIDD) was formerly known as the American Association on Mental Retardation (AAMR), and under that name has appeared as *amicus curiae* in this Court in numerous cases. Founded in 1876, AAIDD is the nation's oldest and largest interdisciplinary organization of professionals and other persons who work exclusively in the field of intellectual disabilities. AAIDD promotes progressive policies, sound research, effective practices, and human rights for people with intellectual and developmental disabilities.

The Arc of the United States (formerly known as the Association for Retarded Citizens of the United States), through its 875 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families.

Mental Health America (formerly known as the National Mental Health Association) was founded in 1909, and is the country's leading nonprofit organization dedicated to helping people live mentally healthier lives. With more than 320 affiliates nationwide, MHA's membership consists of both mental health professionals and lay citizens concerned about mental health issues.

The National Alliance on Mental Illness (NAMI) is the nation's leading grassroots organization dedicated to improving the lives of persons with severe mental illnesses, including schizophrenia, bipolar disorder (manic-depressive illness), major depression, obsessive-compulsive disorder, and severe anxiety disorders. NAMI strongly opposes the death penalty for people with severe, biologically-based mental illnesses.

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In The Supreme Court of the United States

JALIL ABDUL-KABIR,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division.

BRENT RAY BREWER,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division.

On Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF CHILD WELFARE LEAGUE OF AMERICA, JUVENILE LAW CENTER AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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BRIEF FOR THE CHILD WELFARE LEAGUE OF AMERICA, JUVENILE LAW CENTER AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Child Welfare League of America, Juvenile Law Center and National Association of Criminal Defense Lawyers respectfully submit this brief as *amici curiae* in support of petitioners, Jalil Abdul-Kabir and Brent Ray Brewer.[1]

INTEREST OF *AMICI CURIAE*

This Court has observed that "capital proceedings [must] be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding." *Monge v. California*, 524 U.S. 721, 732 (1998) (quoting *Strickland v. Washington*, 466 U.S. 668, 704 (1984)). *Amici* believe that this goal of fairness and accuracy can best be achieved through the presentation of all relevant information – including that associated with adverse events and aspects of a defendant's childhood and adolescence – for full consideration by the fact finders in capital cases. The statements of *amici curiae* Child Welfare League of America, Juvenile Law Center, and National Association of Criminal Defense Lawyers are attached at Appendix A.

SUMMARY OF ARGUMENT

This Court's Eighth Amendment jurisprudence is characterized by a central unifying idea: that a capital sentencing jury's decision must reflect a "reasoned moral response" to the offender and his offense. To ensure such a response, this Court has required that the jury have

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[1] In accordance with Supreme Court Rule 37.6, undersigned counsel certifies that no counsel for any party authored, in whole or in part, any aspect of this brief. Further, no person or entity, other than *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

discretion to consider the defendant's mitigating evidence as it bears on his personal culpability. *See Penry v. Lynaugh*, 492 U.S. 721 (1998) (*Penry I*).

One category of evidence plainly relevant to that determination is that which chronicles abuse, neglect, violence and mental illness during childhood and adolescence. Both Mr. Abdul-Kabir[2] and Mr. Brewer[3] presented such evidence to the jury in mitigation of sentence. However, the former Texas capital sentencing statute, under which both petitioners were sentenced, made no mention of mitigating evidence and did not advise the sentencing jury to decide whether death was the appropriate sentence in light of all the evidence presented. Instead, the jury in the case of each petitioner was restricted to narrow determinations regarding the "deliberateness" of the

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[2] *See Cole v. Dretke*, 418 F.3d 494, 500 (5th Cir. 2005). At his trial, Jalil Abdul-Kabir (*né* Ted Calvin Cole) introduced evidence of his traumatic background. The court below found that Cole had had "a very rough, rugged childhood," "a bad, very painful background," and that he "never felt loved or worthwhile in his life." *Id.* Other evidence introduced at trial included: (1) Cole's mother was an alcoholic who was unable to care for her children; (2) Cole's father deserted the family when Cole was five years old, dropping Cole off a block from where he thought Cole's mother lived, never to be heard from again; (3) Cole's mother then moved with her children to her parents' home; (4) Cole's grandparents were alcoholics who did not want the children to live with them; (5) Cole was placed in a children's home at the age of five; (6) during Cole's five years in the home, his mother visited him only twice; and (7) Cole's father never visited him at the home. *Id.*

[3] *See* Petition for Writ of Certiorari, *Brewer v. Dretke*, No. 05-11287, at 3-4 (May 30, 2006). Brent Ray Brewer introduced evidence of extensive childhood abuse at the hands of his father, who suffered from Post-Traumatic Stress Disorder due to his military service during the Vietnam War. *Id.* Brewer presented evidence that he did not know his father until he was fifteen years old, and that he and his mother were abused by him. *Id.* He was beaten by his father with various objects, including the butt of a pistol and a flashlight. *Id.* Three months before the incident for which Brewer was prosecuted for murder, he was involuntarily committed to a psychiatric hospital in response to suicide threats. *Id.* It was there he met his co-defendant who managed to control and manipulate him. *Id.*

defendant's acts and the likelihood that the defendant would be a further danger to society.[4]

Abuse of and violence against children and adolescents is understood to occasion great harm on developing youth. This understanding is reflected in the capital jurisprudence of this Court; the actions of the federal and state legislatures; and in the literature, film, and music in our culture. The potential harm from victimization in youth is understood to increase the chances that a person so damaged may act out violently as an adult, as opposed to others who do not share a similar experience in childhood or adolescence. Such a cycle of violence is both aggravating, in that it makes an individual more likely to be dangerous in the future, and mitigating, as it offers a well-understood explanation for behavior that other violent actors cannot claim.

The Fifth Circuit has again misinterpreted the Court's capital jurisprudence as expressed in *Penry I*, *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*) and *Tennard v. Dretke*, 542 U.S. 274 (2004). These cases, taken together, indicate that the jury in a capital case must be allowed an adequate vehicle for consideration of such relevant mitigating evidence. Because no such procedure existed in the capital sentencing trials of Mr. Abdul-Kabir and Mr. Brewer, their sentences of death cannot be considered an

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[4] *See* TEX. CODE CRIM. PROC. ANN. art. 37.071. ("Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment . . . [o]n conclusion of the presentation of the evidence, the court shall submit the following issues to the jury: (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.").

accurate or fair determination of their appropriate punishments.

ARGUMENT

I. EVIDENCE OF A DISRUPTED CHILDHOOD OR ADOLESCENCE – INCLUDING EVIDENCE OF CHILD ABUSE, NEGLECT, DOMESTIC VIOLENCE, AND MENTAL ILLNESS – IS RELEVANT MITIGATING EVIDENCE AS TO PUNISHMENT IN A CAPITAL CASE.

> *[W]hen families are wracked by violence and abuse, values are corrupted. The messages transmitted by parents are messages of violence, cruelty, and powerlessness. . . . **Domestic violence damages children.** Thousands of children have been scarred by violence in their homes. Sometimes they are terrified witnesses of abuse; and sometimes they are the victims. But always, these children absorb messages of violence. And all too often, these messages are transmitted to the next generation. Violence begets violence, and the cycle of domestic abuse continues, generation after generation.*
>
> – Attorney General John Ashcroft[5]

This Court well understands the long-lasting harm that may result from adverse conditions in a young person's formative years:

> A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being. It requires no citation of authority to assert that children who are abused in their youth generally face extraordinary problems developing into responsible, productive citizens. The same can be said of children who, though not physically or emotionally abused, are passed from one foster

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[5] Prepared Remarks, Annual Symposium on Domestic Violence (October 29, 2002) (transcript available at http://www.usdoj.gov/ovw/nac/agremarks.htm).

> home to another with no constancy of love, trust, or discipline.

Santosky v. Kramer, 455 U.S. 745, 788 (1982) (Rehnquist, J., dissenting).

Youth and adolescence are the times in life when personalities are formed, values are instilled, and character is shaped. When the home environment is a place of uncertainty and terror rather than one of stability and guidance, a person's development is severely impaired, and individuals can understandably suffer the ill effects of such a disrupted development phase long into adulthood. Should a child so harmed during youth end up in trouble with the law as an adult, the evidence of such a disrupted childhood or adolescence – including evidence of child abuse, neglect, domestic violence, and mental illness – is unquestionably relevant mitigating evidence as to punishment. The mitigating value of such evidence flows from the understanding that a youngster so harmed may be more likely to act out in an antisocial way as an adult, and is therefore less morally culpable for the criminal act than a person who did not suffer such harm at others' hands. The mitigating value of such evidence is powerful whether it relates to an attempt to understand a young person's substance abuse, or the root causes of a capital murder.

This Court has long recognized that sentencing determinations require "consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Commonwealth of Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 61 (1937). This is never more true than in a capital case, because the irreversible nature of the death penalty requires that it be imposed only if, during the sentencing process, convicted persons are considered as "uniquely individual human beings." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

The accuracy of a sentence of death is dependent on procedures that ensure that jurors in capital cases must take into consideration the "character and record of the

individual offender and the circumstances of the particular offense." *Id.* The procedures that insure the consideration of the unique aspects of a person charged with a capital offence are a "constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*; *see also Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) ("The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.").

In *Lockett*, this Court discussed the mitigating value of evidence of youth *qua* youth. *See Lockett,* 438 U.S. 586. In striking down the Ohio sentencing statute as unconstitutional, the Court held that under that scheme, "consideration of a defendant's comparatively minor role in the offense, *or age*, would not generally be permitted, as such, to affect the sentencing decision." *Id.* at 610 (emphasis added). *See also Johnson v. Texas*, 509 U.S. 350 (1993) (presenting issue whether the unadorned special issues adequately allowed jurors to consider mitigating evidence of youth *qua* youth).

However, this Court has held that it is not simply a question of relative youth or age that is relevant to the sentencing decision in a capital case. Rather, the formative events and aspects of a capital defendant's childhood and adolescence are also evidence relevant to the question of the appropriate punishment. For example, in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), this Court reversed the sentence of death based on the sentencer's refusal to consider such aspects of Mr. Eddings' youth:

> Eddings was a youth of sixteen years at the time of the murder . . . . The trial judge recognized that youth must be considered a relevant mitigating factor. But youth is more than a chronological fact. *It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.* . . . Just as the chronological age of a minor is itself a relevant mitigating factor of great weight, *so must the background*

> *and mental and emotional development of a youthful defendant be duly considered in sentencing.*

Id. at 115-116 (emphasis added).

Additionally, the Court noted that "youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." *Id.* at 115 n.11. By acknowledging the collective responsibility of society for the development of youth, the Court recognized that without intervention or an external support system, such young people may well be burdened with an inability to grow into mature, law-abiding adults. Such impaired young people are released from dysfunctional homes into a difficult and confusing world, unable to adjust to the demands of everyday life, and in possession of a skewed perspective formed by years of maltreatment.

Evidence of abuse and neglect during a person's formative years is exactly the kind of evidence this Court has traditionally viewed as potentially mitigating. For example, the petitioner in *Hitchcock v. Dugger* introduced mitigating evidence to show that:

> [A]s a child [he] had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that [he] had been one of seven children in a poor family . . . [and] that his father had died of cancer. . . .

Hitchcock v. Dugger, 481 U.S. 393, 397 (1987). A unanimous Court held that because some of Hitchcock's mitigating evidence had fallen outside the scope of the items on the former statutory list, his sentencing "did not comport with the requirements of . . . *Lockett*," and therefore resentencing was required. *Id.* at 399.

Following *Hitchcock*, this Court decided *Penry I,* in which it held that the former Texas capital sentencing scheme – the very same procedure employed at the trials of both Mr. Abdul-Kabir and Mr. Brewer – provided a constitutionally inadequate vehicle for jurors to consider

and give effect to Penry's mitigating evidence of mental retardation and severe childhood abuse. *Penry I,* 492 U.S. 302; *see also Penry II*, 532 U.S. at 797 (describing "give effect to" language of *Penry I* as "the key" to that decision). Johnny Paul Penry was mentally retarded, having been diagnosed with organic brain damage as a child. *Penry I*, 492 U.S. at 307. The Court found that Penry's brain damage may have been caused by beatings and multiple injuries to his brain at an early age. *Id.* at 308-309. In addition, Penry's sister testified that their mother had frequently beaten Penry over the head with a belt when he was a child, and that he was routinely locked in his room without access to a toilet for long periods of time. *Id.* at 309. Penry was in and out of a number of state schools and hospitals until his father removed him from state schools altogether when he was 12. *Id.* Even the State's psychiatrist testified that Penry "had a very bad life" and had been "socially and emotionally deprived." *Id.* at 309-310.

In striking down the application of the unadorned Texas sentencing structure in Mr. Penry's case, the Court explained that "underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant." *Id.* at 319. The Court continued:

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that *defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.*"

Id. (emphasis added) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987)). The Court held that, "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty . . . the jury was not provided

with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* at 328. Thus, the case was remanded for resentencing to ensure that "the death penalty will [not] be imposed in spite of factors that may call for a less severe penalty." *Id.*[6]

The presentation of evidence regarding the negative aspects of a defendant's childhood and adolescence often serves as a central aspect of the argument for a sentence of life rather than death. For example, in *Williams v. Taylor*, 529 U.S. 362 (2000), the Court reversed Mr. Williams' death sentence based in part on the fact that his attorneys failed to investigate and present substantial mitigating evidence during the sentencing phase of his trial. The omitted evidence included a description of mistreatment, abuse, and neglect during Williams' early childhood. *Williams*, 529 U.S. at 391-392. Had his attorneys done a proper investigation, the jury would have heard that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings,[7] that Williams had

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[6] *See also Penry II*, 532 U.S. at 804. In *Penry II*, the Court again addressed the Texas sentencing scheme and once again found it deficient, this time due to an inadequate supplemental jury instruction. *Id.* The Court held that

> [t]he mechanism created by the supplemental instruction . . . inserted 'an element of capriciousness' into the sentencing decision, 'making the jurors' power to avoid the death penalty dependant on their willingness' to elevate the supplemental instruction over the verdict form instructions. (citations omitted). There is, at the very least, 'a reasonable likelihood that the jury . . . applied the challenged instruction in a way that prevent[ed] the consideration of Penry's mental retardation and childhood abuse. (citation omitted). The supplemental instruction therefore provided an inadequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence.

Id. at 800.

[7] *Williams*, 529 U.S. at 395 n.19. Juvenile records contained the following description of Williams home: "The home was a complete wreck. . . . There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the

(Continued on following page)

been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody." *Id.* at 395. After hearing the additional evidence developed in the post-conviction proceedings, the judge who presided at Williams' trial and who had previously determined that the death penalty was "just" and "appropriate," concluded that there existed "a reasonable probability that the result of the sentencing phase would have been different" if the jury had heard that evidence. *Id.* at 396-397.

More recently, this Court held in *Roper v. Simmons*, 543 U.S. 551 (2005), that the Constitution precludes the execution of juveniles. Justice Kennedy, writing for the majority, noted that juveniles "have less control, or less experience with control, over their own environment . . . [t]heir own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Roper*, 543 U.S. at 569-570. Thus, this Court recognized that juveniles are less blameworthy for failing to escape their unfortunate situations. Those same children who were unable to escape negative influences as children and who were subjected to those influences throughout their formative years may well grow up lacking the skills to mature into self-restraining and law abiding citizens.

In *Roper*, the Court also grappled with the difficulty in differentiating between "the juvenile offender whose crime

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bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. . . . The children were all dirty and none of them had on underpants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. . . . The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey." *Id.*

reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*, 543 U.S. at 573. The Court noted the professional standards "forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder . . . which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others." *Id.* These juveniles whom psychiatrists are reluctant to label as "antisocial" by virtue of their age are the very individuals that may later go on to commit crimes. Their inability to deal with societal demands does not always evaporate by virtue of a few more years of experience. In fact, additional negative life experiences can solidify the antisocial behavior, which then becomes a permanent aspect of these adults' personalities. Because abused, neglected and disabled children often remain incapable of escaping those negative influences as adults, their crimes are more understandable – and are therefore worthy of lesser punishment – as the product of the harm they suffered when young.

II. THE LINK BETWEEN THE HARM CAUSED BY CHILDHOOD ABUSE AND TRAUMA AND SUBSEQUENT ANTISOCIAL OR CRIMINAL BEHAVIOR IS REFLECTED IN FEDERAL AND STATE LAWS.

Americans have a firm resolve when it comes to violent crime. Most favor stiff punishment for the offender, while expressing compassion for the victims of serious crimes. Yet the issue becomes complicated when one considers that many victimizers were once victims themselves. Although most children who endure abuse or neglect grow up healthy and law-abiding, the exceptions yield a disturbing and widespread irony: When a community fails to

protect a child from harm, it may soon be calling for that young person's head.[8]

Under both state and federal laws, child abuse is considered a serious crime. In 1974, the federal government passed its first law addressing child abuse and neglect, the Child Abuse Prevention and Treatment Act ("CAPTA"), 42 U.S.C. 5101 *et seq.* This Act provides federal funding to states in support of child abuse prevention, assessment, investigation, prosecution, and treatment activities, and also provides grants to public agencies and nonprofit organizations for demonstration programs and projects.[9] CAPTA also sets forth baseline definitions of child abuse and neglect, including both acts and omissions, to guide states in enacting child abuse and neglect reporting laws. In order to receive funding through CAPTA, states must establish a mandatory reporting system for suspected child abuse and set forth minimum punishments for failure to report. Even prior to CAPTA's enactment, almost every state had some system for reporting child abuse or neglect. However, often these reports did not capture incidents of child abuse until after the victim had suffered permanent psychological or physical damage, or even death. *See* H.R. REP. NO. 93-247 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 2763, 2765.

CAPTA has been reauthorized numerous times since 1974. Repeatedly, in Congressional reauthorization hearings, legislators have emphasized the severe effects abuse and neglect have on children as they mature. During the 1988 reauthorization of CAPTA, Senator Strom Thurmond of South Carolina stated, "the growth in reported incidents of child abuse, as well as research suggesting that such

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[8] Katherine Winfield & Rodney Albert, *Breaking the Link Between Child Maltreatment and Juvenile Delinquency*, CHILDREN'S VOICE, Child Welfare League of America, Mar. 2001, http://www.cwla.org/articles/cv0103breaklink.htm (last visited Nov. 26, 2006).

[9] *See* U.S. Department of Health and Human Services, Child Welfare Information Getaway, *About CAPTA: A Legislative History*, Dec. 2004, http://www.childwelfare.gov/pubs/otherpubs/about.pdf (last visited Nov. 26, 2006).

abuse may have *long-term negative results for both the child and society*, have increased concerns regarding the prevention of child abuse, and treatment for abused children." 134 CONG. REC. S3468-02 (daily ed. March 30, 1988) (statement of Sen. Thurmond) (emphasis added). Another legislator, Representative William Goodling of Pennsylvania, shared this view, citing some of the long-term effects caused by childhood abuse: "[T]hese children are our future. Unless they are helped, *unless the abuse and neglect is stopped, they will be ill prepared to meet the daily challenges of living*. Their self-esteem will be low; they will be at great risk of educational failure; they might become runaways; and *they will probably grow up to be adults who abuse their children*." 134 CONG. REC. E10334-02 (daily ed. April 12, 1988) (statement of Rep. Goodling) (emphasis added).

Many legislators expressed their understanding that children who suffer from abuse and neglect are more likely to act in unlawful ways as they grow older. For example, Representative Major Owens of New York emphasized the need for child abuse prevention to protect children from such a fate: "[I]t is common for abused children to blame themselves for the pain they have suffered. Other children who aren't fortunate enough to receive therapy *go on to become abusers of others as well as themselves and possibly turn to crime*." 133 CONG. REC. H4283-02 (daily ed. June 8, 1987) (statement of Rep. Owens) (emphasis added). Many legislators cited the need for child abuse prevention measures based on the well-established research that shows that children who suffer from abuse in the home are more likely to abuse their own children when they become parents.[10] Representative Lloyd articulated other

[10] *See, e.g.*, 134 CONG. REC. H1439-05 (daily ed. April 12, 1988) (statement of Rep. Marilyn Lloyd of Tennessee) ("There is some evidence that children who are abused are more likely than non-abused children to become abusers, creating a cycle of abuse through generations of families."); *Group for Children Aims to Break Cycle of Abuse*, N.Y. TIMES, May, 31, 1987 at Section 1, p. 42, Column 3 ("About 80 percent of batterers grew up in abusive families.") (cited in 133 CONG. REC. H4283-02 (daily ed. June 8, 1987) (statement of Rep. Owens)).

repercussions of child abuse stating, "some victims of child abuse have been found to exhibit physical trauma. Child abuse may manifest itself in both short and long term problems such as emotional and learning disorders, poor school performance, and in suicidal and delinquent behavior." 134 CONG. REC. H1439-05 (daily ed. April 12, 1988) (statement of Rep. Lloyd).

In the most recent reauthorization of CAPTA, consideration of the long-term effects of the harm occasioned by child abuse and neglect led Congress to amend CAPTA to extend the circumstances under which child abuse must be reported. Reports are now required even where child abuse is only reasonably *suspected,* rather than *known. See* Keeping Children and Families Safe Act of 2003, Pub. L. 108-36 Sec. 114 (increasing funding and training opportunities for public education on the role and responsibilities of the child protection system and basis for reporting suspected incidents of child abuse and neglect).

In accord with CAPTA, all fifty states, the District of Columbia, and Puerto Rico have some form of mandatory child abuse and neglect reporting law that specifies mandatory reporters of child maltreatment and dictates the circumstances under which they are to report. These laws typically require persons to report to some type of law enforcement authority or child protection agency when they have reasonable cause to suspect or believe that a child has been abused or neglected, or have knowledge of, or observe a child being subjected to, conditions that would reasonably result in harm to the child. As Representative Owens recognized in 1988, "[c]hild abuse is probably not on the increase necessarily in this country, but the reporting of child abuse is increasing. That is *a sign of the evolution of our society, the fact that we take more seriously these crimes against children.*" 134 CONG. REC. H1439-05 (daily ed. April 12, 1988) (statement of Rep. Owens).

Moreover, many states have broad mandatory reporting statutes that require *all persons* to report child abuse, in lieu of or in addition to requiring certain specified professionals or institutions to report child abuse. For example, Texas requires

"*a person* having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect . . . shall immediately make a report." TEX. [FAM.] CODE ANN. § 261.101(a) (emphasis added).[11] Other states only require certain specified individuals – frequently professionals such as social workers, school personnel, health care workers, mental health professionals, child care providers, medical examiners/coroners, and law enforcement officers – or institutions to report child abuse. Yet even in those states with narrower reporting requirements, legislative change is underway. For example, in 2003, Oregon amended its definition of "public and private officials" in its mandatory reporting statute to include legislators among the individuals who must report child abuse. *See* OR. REV. STAT. § 419B.005(3)(t) (including "Member of the Legislative Assembly" in the definition of public or private individual"); *see also* OR. REV. STAT. § 419B.010 (requiring "[a]ny public or private official having reasonable cause to believe that any child with whom the official comes in contact has suffered abuse or that any person with whom the official comes in contact has abused a child shall immediately report or cause a report to be made"). In a similar vein, some states that do not require all persons to report child abuse nevertheless include members of the clergy in their designated group of mandatory reporters, and provide no exception for the clergy-penitent privilege as grounds for failing to report suspected child abuse or neglect. *See, e.g.,* W. VA. CODE § 49-6A-2 ("When any . . . *member of the clergy* . . . has reasonable cause to suspect that a child is neglected or abused or observes the child being subjected to conditions that are likely to result in abuse or neglect, such person shall immediately . . . report the circumstances or cause a report to be made."); W. VA. CODE § 49-6A-7 ("The privileged quality of communications . . . between any professional person and his patient or his client, except that between attorney and client, is hereby abrogated in situations involving suspected or

[11] For additional examples of broad state mandatory reporting statutes that require all persons to report child abuse, see Appendix B.

known child abuse or neglect.").[12] These broad mandatory reporting statutes reflect society's recognition that child abuse reporting is essential to prevent child abuse and protect children from its grave long-term effects.[13]

Additionally, in July 2006, Congress enacted further federal law protections in The Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act"). The Adam Walsh Act includes several provisions intended to prevent child abuse and to protect children from sexual exploitation and violent crime. This further reflects society's acknowledgment that child abuse has grave harmful effects on children and therefore perpetrators of child abuse should be harshly penalized. In particular, the Act increases current sentences for both the commission of crimes against children and the failure to report abuse. For example, the Act amended 18 U.S.C.A. § 2258 to increase the federal criminal penalty for the failure to report child abuse from a maximum of six months imprisonment (the punishment imposed for a Class B misdemeanor under 18 U.S.C.A. § 3581(b)(7)) to a maximum of one year imprisonment (the punishment imposed for a Class A misdemeanor under 18 U.S.C.A. § 3581(b)(6)) and/or a fine.[14] *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 209,

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[12] For additional examples of state mandatory reporting statutes that require clergy members to report child abuse and provide no exception for the clergy-penitent privilege, see Appendix C.

[13] *See* Child Welfare League of America, Press Release, *CWLA Calls for Federal Law to Make All Members of Congress Mandatory Reporters of Child Abuse and Neglect*, Oct. 3, 2006, http://www.cwla.org/newsevents/news061003congress.htm (last visited Nov. 26, 2006). At the federal level, in October of 2006, the Child Welfare League of America called for a federal law to require all members of Congress to report child abuse and neglect when they learn of it. *Id.*

[14] 18 U.S.C.A. § 2258 (West 2006). The statute relies on the definition of child abuse set forth in the Victims of Child Abuse Act of 1990, Pub. L. No. 101-647, § 226 (c)(1), 104 Stat. 4789, 4806 (1990), which includes "the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child."

120 Stat. 587, 615 (2006).[15] The Act also imposes mandatory minimum terms of imprisonment for specific violent crimes against children, including murder, kidnapping, violence resulting in serious bodily injury, and violence with the use of a dangerous weapon. *See id.* § 202 (amending 18 U.S.C.A. § 3559).[16]

In addition to imposing harsher criminal penalties for offenses against children, the Act eliminated statutes of limitation for the prosecution of felony sex offenses involving a minor. *See id.* § 211 (adding 18 U.S.C.A. §§ 3299 & 3281). The Act also makes it easier and more advantageous for victims of certain sex-related crimes against minors to seek civil remedies by revising federal provisions to allow adults as well as minors to sue for injuries and to increase the minimum level of damages from fifty thousand dollars ($50,000) to one hundred fifty thousand dollars ($150,000). *See id.* § 707 (amending 18 U.S.C.A. § 2255).

This Court has stressed that these laws are attempts to address actual harms perpetrated upon children rather than simply criminalizing adult behavior. For example, the Court recognized that the legitimate purpose of child pornography laws is to protect child victims who are exploited and harmed by their participation in the production of pornographic images. In *Ashcroft v. Free Speech*

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[15] *See also* Pub. L. No. 109-248 § 215 (amending 18 U.S.C.A. § 1153(a) to include the crime of felony child abuse or neglect as a crime punishable within the Indian country).

[16] *See* Pub. L. No. 109-248. The Act increased the mandatory minimum terms of imprisonment and criminal penalties for various sexual offenses against children. Pub. L. No. 109-248 § 203 (amending 18 U.S.C.A. § 2422(b) regarding penalty for coercion and enticement of children to engage in prostitution); Pub. L. No. 109-248 § 204 (amending 18 U.S.C.A. § 2423(a) regarding penalty for transportation of child to engage in prostitution); Pub. L. No. 109-248 § 205 (amending 18 U.S.C.A. § 2242 regarding penalty for sexual abuse), Pub. L. No. 109-248 § 206 (amending 18 U.S.C.A. §§ 2241, 2244, 2245, 2251, 2252, 2252A, 2252B, 2260, 3559 & 3592 regarding penalties for sexual abuse and contact), Pub. L. No. 109-248 § 207 (amending 18 U.S.C.A. § 2243(b) regarding the penalty for sexual abuse of wards), Pub. L. No. 109-248 § 208 (amending 18 U.S.C.A. § 1591(b) regarding mandatory penalties for sex-trafficking of children).

Coalition, 535 U.S. 234 (2002), this Court affirmed a ruling by the United States Court of Appeals for the Ninth Circuit striking the federal Child Pornography Prevention Act of 1996 ("CPPA") as overbroad, in violation of First Amendment free speech rights. CPPA "extend[ed] the federal prohibition against child pornography to sexually explicit images that appear[ed] to depict minors but were produced without using any real children," such as images created by using adults who look like minors or by using computer imaging. *Id.* at 239-240.

The Court struck down the CPPA in part because the "virtual child pornography" images banned by the statute did not involve children in the production process. Therefore, the images were not the product of child sexual abuse that the state had an interest in stamping out without regard to judgment regarding its content. *Id.* at 241. Because no actual children are involved, the images did not record any crime, nor did they create any victims by their production. *Id.* at 250. It is the harmful effect on the children who are exploited in the creation of child pornography that warrants affording child pornography no First Amendment protection. *See, e.g., id.* at 244 ("The sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of decent people.").

III. JURORS MUST BE GIVEN A VEHICLE FOR EXPRESSING THEIR REASONED MORAL RESPONSE TO RELEVANT MITIGATING EVIDENCE OF YOUTHFUL VICTIMIZATION.

Jurors face an extremely serious and difficult decision when determining the appropriate sentence in a capital case. Although the decision is guided by law, it is also dependent upon the facts of the case and the circumstances of the offender. Each juror brings their own experience and understanding regarding human nature to that decision. Part of that understanding includes the accepted concept that victims of childhood violence may become perpetrators of violence as adults. That knowledge of human nature also makes such evidence mitigating, as it suggests a reason for criminal behavior not available to

others who were not so traumatized. Capital sentencing structures must allow jurors an opportunity to express that belief, which is based in society's common experience.

A. Jurors' Widely Held Notion that Childhood Abuse and Trauma Are Often Catalysts for Adult Acts of Violence Is Reflected in Popular Literature, Films, Television and Music.

> *I and the public know*
> *What all schoolchildren learn,*
> *Those to whom evil is done*
> *Do evil in return.*[17]

Before they are seated in the jury box, jurors in capital cases are citizens who access a wide range of historical, societal and cultural information. Media sources that inform and shape jurors' perceptions permeate our society and reflect common wisdom. One such inescapable message that jurors understand before they enter the courthouse is that children who suffer childhood abuse or trauma are more likely to act out violently as adults. This cycle of violence, in which childhood victims of abuse and trauma are transformed into violent adults, is frequently portrayed in popular culture to explain the violent or antisocial behavior of adult characters.

The audience of such portrayals in literature, film, and television – future jurors – are left to decide for themselves whether the characters' violent backgrounds diminish their culpability or make them irretrievably evil. A similar role is performed by the jury in a capital proceeding, where evidence of such childhood abuse can be a two-edged sword. *See Penry I*, 492 U.S. at 324. Such evidence can be seen as both aggravating and mitigating, and it is incumbent on the jurors to properly weigh the relative value of each side of this sword in any given case. Under Texas' former sentencing scheme, jurors

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[17] W.H. AUDEN, *September 1, 1939*, *in* COLLECTED POEMS 86 (Edward Mendelson ed., 1991) (cited in Abbe Smith, *The "Monster" in All of Us: When Victims Become Perpetrators*, 38 SUFFOLK U.L. REV. 367 (2005) (discussing the "cycle of violence" that transforms victims into perpetrators).

were not given any vehicle for considering the mitigating aspects of evidence demonstrating abuse, neglect and violence during the defendant's youth. Instead, they were required to reduce a multifaceted portrayal of the defendant's life and background to a yes or no answer in response to a question of future dangerousness.

The cycle of violence is often invoked to explain and predict the violent behavior of the protagonists/antagonists in literature, film, television and song lyrics. In suspense and horror films, adult characters who commit violent acts are often depicted as having suffered extremely traumatic childhoods marred by abuse, neglect, and psychological torture.[18]

Not all portrayals of the cycle of violence in film are severe. In *Good Will Hunting*, the protagonist, Will Hunting, is a mathematical genius who is repeatedly incarcerated for his violent and antisocial tendencies. Will is ordered to attend therapy, and through his treatment, he confronts his abusive youth in which he was victimized first by his father and then by his foster father:

> *Will*: My father was an alcoholic. Mean f***in' drunk. Used to come home hammered, looking to whale on someone. So I had to provoke him, so he wouldn't go after my mother and little brother. Interesting nights were when he wore his rings . . . .
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> * * *

[18] In Alfred Hitchcock's iconic 1960 suspense film, PSYCHO, the main character, Norman Bates, endures years of physical, emotional, and sexual abuse by his mother until he finally kills her and her lover. As an adult, he develops severe psychosis, adopting the persona of his deceased mother and committing three murders. PSYCHO (Paramount Pictures 1960); *see also* A NIGHTMARE ON ELM STREET (New Line Cinema 1984) (Freddy Krueger is conceived by rape and given up for adoption at birth, then is placed in foster care with an abusive alcoholic man who ultimately adopts him. In adulthood, Freddy kills his adoptive father and commits a series of child murders); STAR WARS EPISODE I – THE PHANTOM MENACE (Twentieth Century Fox 1999) (Darth Vader is enslaved as a child, along with his mother. His mother is killed before his eyes and he ultimately turns to "the dark side.").

> *Will (referring to his foster father):* He used to just put a belt, a stick, and a wrench on the kitchen table and say, "Choose."

GOOD WILL HUNTING (Miramax 1997).

In the films described above, the filmmakers depicted acts of violence committed by adults who suffered childhood abuse. Other filmmakers have used childhood abuse as the backdrop for a story of an adult who seeks vengeance against his or her childhood abuser, or a suspected child abuser.[19] In addition, several filmmakers have dramatized the real-life stories of individuals who were abused as children and subsequently engage in violent behavior as adults.[20]

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[19] *See, e.g.*, MYSTIC RIVER (Warner Bros. 2003) (portraying a man who is sexually abused as a child and who, in adulthood, kills a man who he believes is going to abuse a young child); SLEEPERS (Warner Bros. 1996) (depicting children who were routinely physically and sexually abused by guards in a detention facility and who, in adulthood, seek revenge by murdering one of the guards. *Cf. Lost: What Kate Did* (ABC television broadcast, Nov. 30, 2005) (depicting a woman, Kate, who sets fire to her parents' home, intentionally murdering her alcoholic and physically abusive father).

[20] *See, e.g.*, ANTWONE FISHER (Twentieth Century Fox 2002) (depicting a navy sailor sent to a naval psychiatrist for help after a series of violent outbursts, where he confronts a painful past of abuse at the hands of his foster family.); *see also* Stephen Holden, Film Review: *A Director And His Hero Find Answers In the Details*, N.Y. TIMES, December 19, 2002 ("In one scene the young Antwone, his hands tied, is savagely beaten with a wet dish towel for supposedly dirtying the walls. In another, she menaces the boy with a flaming torch made from a rolled-up newspaper."); MONSTER (Columbia Pictures 2003) (telling the story of Aileen Wournos, a young woman who as a child was neglected and abandoned by her mother, and left in the care of alcoholic grandparents who physically, emotionally, and sexually abused her. After committing a series of minor crimes, Aileen hitchhikes to Florida where she is tried, convicted, and subsequently executed for killing seven men whom she claimed tried to rape her while she was working as a prostitute.); Abbe Smith, *The "Monster" in All of Us: When Victims Become Perpetrators*, 38 SUFFOLK U.L. REV. at 370-73, 382, 393 (focusing on the case of Aileen Wournos; arguing that "people to whom terrible things are done and people who do terrible things . . . are often the same people"; and asserting that "among those who have committed

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Like filmmakers, novelists and playwrights also employ the cycle of violence in their exploration of the complicated pasts of their violent characters. Toni Morrison's Pulitzer Prize-winning novel *Beloved* traces the tragic history of an escaped slave named Sethe who is viciously abused, both physically and sexually, during her childhood and adolescence in slavery. When the slave hunters come looking for her, Sethe kills her infant child to prevent her from being sold into slavery, and attempts to kill her other child. TONI MORRISON, BELOVED (Alfred A. Knopf, Inc. 1987). In *The Lovely Bones*, the antagonist, George Harvey, watches three men attack his mother in their home when he is five years old. His mother then takes George to escape and runs over the three attackers, killing them. Shortly afterward, George witnesses his father kill his mother. Seeing these acts of violence provokes a deep hatred of women, and by his mid-30s, George has killed a dozen women and girls. ALICE SEBOLD, THE LOVELY BONES (Little, Brown & Company 2002).

Popular playwright Martin McDonagh has also used the cycle of violence as a theme in his play, *The Pillowman*. In *The Pillowman* the main character, Katurian, is a short story writer whose bizarre stories begin to come true. As a child, Katurian discovers that his brother, Michal, whom he never knew existed, was living in his house and was routinely tortured by his parents. In an effort to save his brother, Katurian smothers his parents with pillows, killing them both. However, the years of torture left Michal

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serious crime, it is the rare perpetrator who has not also suffered. It is the rare death row inmate whose life does not read like a case study of extreme deprivation and abuse. It is the rare juvenile incarcerated in an adult prison for rape or murder who has had anything other than the cruelest of childhoods . . . [I]t is well documented that [abused and neglected] girls grow up to become the vast majority of women in prison.") (citing Phyllis Crocker, *Feminism and Defending Men on Death Row*, 29 ST. MARY'S L.J. 981, 986-87 (1998); James Garbarino, *Children in Danger: Coping With the Consequences of Community Violence* (1992); and Cathy S. Widom & Michael G. Maxfield, Nat'l Inst. of Justice, *An Update on the Cycle of Violence* (Feb. 2001)).

severely mentally impaired. Many years later when Katurian and Michal are brought to the police station for questioning about a series of murders that mirror Katurian's short stories, Michal confesses to Katurian that he indeed copied Katurian's stories and murdered two children. MARTIN MCDONAGH, THE PILLOWMAN: A PLAY (Faber & Faber 2004).[21]

Songwriters also introduce themes of childhood violence to explain pain and violence in their songs. In her song, *He Never Got Enough Love*, Lucinda Williams depicts the destructive consequences of years of psychological, emotional, and physical child abuse. A young boy is abandoned by his mother at an early age and is left with his alcoholic and abusive father, who routinely verbally and physically abused him. When the child enters adulthood, he takes out his own anger out on a stranger, seeking to prove correct his father's negative perception of him. LUCINDA WILLIAMS, *He Never Got Enough Love, on* SWEET OLD WORLD (Chameleon Records 1992).

Further, television series provide possibly the broadest examples of society's understanding of the cycle of violence. For example, on *Lost*, one of television's most popular series, one of the main characters, Sawyer, is a petty criminal whose past history of child abuse is used to explain his adult behavior. When Sawyer was a child, his mother had an affair with a man who would eventually con Sawyer's family out of their life savings, prompting Sawyer's father to murder his mother and then commit suicide. When Sawyer gets into financial trouble as an adult, he turns to a life of con artistry and murders a man

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[21] Even the critic who reviewed the play recognized the prevalence of the cycle of violence as a theme: "McDonagh shows that often abused children grow up to be miserable adults. He has Katurian write about a hero, the Pillowman, who offers abused children a way out by enticing them to suicide to spare them a life of despair." Tom Williams, *Sadistic Tale of Storytelling Shocks us to the Core*, CHICAGO CRITIC.COM, September 23, 2006, http://www.chicagocritic.com/html/the_pillowman.html (last visited Nov. 26, 2006).

whom he suspects was his mother's former lover. *Lost: Outlaws* (ABC television broadcast, Feb. 16, 2005).[22]

What jurors learn from the cultural references to which they are exposed every day is that abused children and adolescents may grow up to become violent adults. However, they are often led to understand that, by influence of that trauma and harm in youth, a person so abused in childhood is not as morally culpable for criminal acts as one with no such violent past.

There can be no dispute that such evidence is relevant to the sentencing determination in a capital case. When asked to weigh the option of life or death for these victims of childhood abuse, jurors must be given a vehicle for expressing their decision that a particular act of violence may be the product of a damaged, rather than depraved, psyche. However, Texas' former "special issues" only permit the jurors to give effect to the relevant *aggravating* aspects of such evidence through their answer to the question whether the petitioners probably would constitute a "continuing threat to society." Thus, the instructions effectively require the jurors to interpret all aspects of the evidence of childhood abuse and trauma only as aggravating and foreclose any consideration of the equally compelling mitigating aspects of such evidence.

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[22] Violent adolescents are also portrayed as victims of childhood abuse on television. The widely popular television series *Buffy the Vampire Slayer* features Buffy Summers, a young woman chosen by fate to hunt and kill vampires. In one episode, Buffy mistakes her classmate, Cordelia, for a vampire. Wielding a makeshift stake, Buffy pushes Cordelia up against the wall. When Buffy sees that she has mistakenly attacked Cordelia, and when she lets her go, Cordelia responds, "God! What's your childhood trauma?" *See Buffy the Vampire Slayer: Welcome to the Hellmouth* (WB television broadcast, May 10, 1997) (transcript available at www.buffyology.com/transcripts/001-1-01-welcometothehellmouth.html); *see also* John Harlow, *Throw Off Your Anoraks and Rejoice*, N.Y. TIMES, January 11, 2004 (describing the quotation regarding childhood trauma as having "entered dictionaries of pop-culture quotations").

B. The Fifth Circuit's Continued Restrictions on the Type of Evidence Deemed "Relevant" to the Capital Sentencing Decision Violate this Court's Precedents.

This Court recently rejected the Fifth Circuit's "constitutional relevance" test, which placed limitations on the consideration of relevant mitigating evidence in the Texas capital sentencing context. *See Tennard*, 542 U.S. 274; *see also Smith v. Texas*, 543 U.S. 37, 43-44 (2004) (rejecting similar "threshold test" for mitigating evidence). In so doing, the Court plainly defined the broad range of mitigating evidence relevant to the question of punishment:

> When we addressed directly the relevance standard applicable to mitigating evidence in *McKoy v. North Carolina*, 494 U.S. 433 (1990), we spoke in the most expansive terms. We established that the "meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other context. . . .

Tennard, 542 U.S. at 284 (quoting *McKoy*, 494 U.S. at 440). For mitigating evidence to be considered relevant, it need only have a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *New Jersey v. T.L.O.*, 469 U.S. 325, 345 (1985) (quoting FED. R. EVID. 401). Judge Dennis, dissenting from the denial of the motion for rehearing en banc in Mr. Abdul-Kabir's case, articulated the standard:

> In *McKoy v. North Carolina* . . . , the Court reaffirmed or clearly established that the principle of relevance under Federal Rule of Evidence 401 applies in capital cases and cannot be distorted by the state so as to interfere with the sentencer's full consideration and use of relevant evidence in culpability assessment and sentence selection.

Cole v. Dretke, 443 F.3d 441, 446 (5th Cir. 2006) (citation omitted) (en banc reh'g denied) (Dennis, J., dissenting from denial of reh'g).

Prior to this Court's correction in *Tennard*, however, the Fifth Circuit utilized a test for "constitutional relevance" which it characterized as a "screening test" for mitigating evidence. *Robertson v. Cockrell*, 325 F.3d 243, 251 (5th Cir. 2003).[23] In *Tennard*, this Court stated that the Fifth Circuit's "constitutional relevance" test "has no foundation in the decisions of this Court. Neither *Penry I* nor its progeny screened mitigating evidence for 'constitutional relevance' before considering whether the jury instructions comported with the Eighth Amendment." *Tennard*, 542 U.S. at 284. Not only did the test lack the support of this Court's precedent, but it had the detrimental effect of screening out mitigating evidence that was obviously relevant in a capital sentencing proceeding. *Id.* at 285-86.

Despite this Court's rejection of the "constitutional relevance" test in *Tennard*, the Fifth Circuit continues to employ the functional equivalent of the test in its evaluation of mitigating evidence. This is particularly noticeable in *Brewer* when the lower court, in discussing mitigating evidence presented at Brewer's trial, notes a "constitutional distinction between, on the one hand, 'severe' abuse of the type Penry sustained and, on the other, a 'mere' troubled childhood of the sort Graham experienced." *Brewer v. Dretke*, 442 F.3d 273, 279 n.16 (5th Cir. 2006). The court continued, "there does not appear to be one iota of evidence suggesting either that Brewer's condition is permanent or that he experienced cognitive limitations of any sort as the result of it." *Id.* at 281.

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[23] The lower court's previous test required a petitioner to show that (1) he had a "uniquely severe permanent handicap" acquired through no fault of his own, and (2) there was a nexus between the offense and the petitioner's "severe permanent condition." *Davis v. Scott*, 51 F.3d 457, 460-61 (5th Cir. 1995), *overruled in part by Tennard*, 542 U.S. at 282-84. As to the first requirement, the Fifth Circuit explicitly stated that the mitigating evidence must relate "either to severe mental retardation or extreme child abuse." *Smith v. Cockrell*, 311 F.3d 661, 680 (2002). The second requirement was a "nexus requirement," calling for a connection between the offense committed and the condition to which the mitigating evidence refers. *Id.* at 680-81.

The Fifth Circuit's resurrection of its "constitutional relevance" test again allows for a closed-door approach to the relevance of mitigating evidence. As Judge Dennis reiterated:

> Cole's moral culpability was a factor of consequence to the outcome of the sentencing proceeding. Cole's evidence of his organic neurological defect, lack of impulse control, and destructive family background was relevant mitigating evidence, as the Cole panel concedes, because it made it more likely that the jury would assess Cole with a lower level of culpability than it would have without that evidence. The panel does not dispute, but tacitly admits, that the State failed to comply with its duty and responsibility to empower and allow the sentencing jury to fully consider and fully give effect to Cole's relevant mitigating evidence by assessing his culpability and selecting his sentence on the basis of that evidence and assessment.

Cole, *supra*, 443 F.3d at 449.

This Court has long held that the statutory means employed to enable jurors to consider mitigating evidence may differ. *See, e.g. Ayers v. Belmontes*, ___ U.S. ___, 127 S.Ct. 469, 472 (2006) (upholding California catchall provision instructing jury to consider "[a]ny other circumstance which extenuates the gravity of the crime" as adequate vehicle for consideration of mitigating evidence).[24] However,

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[24] In *Belmontes*, the Court reaffirmed its previous holding that States are free to "structure and shape consideration of mitigating evidence," in order to achieve "a more rational and equitable administration of the death penalty." *Boyde v. California*, 494 U.S. 370, 377 (1990). States certainly retain a strong interest in assuring that the sentencer's decision is rational rather than purely emotional or arbitrary. This conclusion is apparent from the types of "structuring" and "shaping" devices this Court has approved; for example, the Court has endorsed instructions requiring the jury to "render its decision on the evidence without sympathy," *Saffle v. Parks*, 494 U.S. 484, 490 (1990) or to avoid the influence of, *inter alia*, "public opinion or public feeling." *Brown*, 479 U.S. at 539. Neither practice circumscribes the

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the Court has never approved a system which constrains the admissibility or consideration of mitigating evidence based on harsh relevance standards. Indeed, this Court has always understood that it is the function of the sentencer to determine the weight of evidence and that determination cannot be taken from them by action of the state or courts. For example, in *Eddings*, this Court held that the sentencer is entitled to determine the weight to be given to mitigating evidence in deciding whether a defendant should be sentenced to death. *See Eddings*, 455 U.S. at 113-14 ("The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.").[25]

A similar issue regarding the limitation of relevant evidence was presented in *Skipper v. South Carolina*, 476 U.S. 1 (1986). In that case, the trial judge held that Mr. Skipper's evidence that he would adjust well to prison

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jury's ability to assess the mitigating significance of the defendant's evidence in a given case. Nor does either rule preclude the jury's ultimate moral judgment that death is an excessively harsh sentence for a particular defendant, in light of his reduced culpability. Indeed, precisely because the sentencer's response should be *reasoned* and *moral*, States may prevent jurors from deciding capital cases on mere whim or sympathy.

[25] In *Eddings*, Justice Powell's opinion for the Court characterized the decision of the Oklahoma Court of Criminal Appeals as holding that Mr. Edding's mitigating evidence was "not relevant." 455 U.S. at 113. Conversely, Justice Powell held that the evidence *was* relevant:

> Nor do we doubt that the evidence Eddings offered was relevant mitigating evidence. Eddings was a youth of 16 years at the time of the murder. Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation . . . In some cases, such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant.

Id. at 115.

"would be irrelevant and hence inadmissible." *Id.* at 3. Similarly, the State argued that mitigating evidence of past good conduct in jail was relevant only to establish good character. Thus, it urged the Court to hold that there was no constitutional violation in excluding the evidence proffered to show "future adaptability to prison life." *Id.* at 6-7. The Court rejected those arguments and held that it was improper to exclude the evidence because doing so would violate the rule that the sentencer may not refuse to consider, nor be precluded from considering, any relevant mitigating evidence that the defendant submits in support of a sentence other than death. *Id.* at 7 (citing *Eddings*, 455 U.S. 104). In reaching that conclusion, the Court held:

> The only question before us is whether the exclusion from the sentencing hearing of the testimony petitioner proffered regarding his good behavior during the over seven months he spent in jail awaiting trial deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment. It can hardly be disputed that it did. . . . Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, . . . there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'

Id. at 4-5.

Based on this Court's decisions, it is clear that evidence of adverse events in childhood, like those suffered by Mr. Abdul-Kabir and Mr. Brewer, is the type of mitigating evidence that is relevant to the capital sentencing determination. Nothing in this Court's decisions supports the Fifth Circuit's continued resistance to *Tennard*, *Penry I*, and *Penry II*. All of those cases proceed from the premise that the sentencing authority must be permitted to consider and give effect to whatever relevant mitigating evidence a capital defendant may present. If such evidence is relevant to the future dangerousness inquiry but is potentially mitigating for other reasons, the "future

dangerousness" special issue alone will not enable the jurors to give full effect to the defendant's mitigating evidence. By definition, in such circumstances, the second special issue will restrict the jury's consideration in a way that does not encompass the full mitigating force of the defendant's evidence. This is certainly the case with evidence that a defendant was a victim of childhood abuse and that he is now, as an adult, a participant in the well-understood cycle of violence.

CONCLUSION

Like the evidence in *Tennard, Penry I*, and *Penry II*, relevant mitigating evidence of adverse events in childhood presented by Mr. Abdul-Kabir and Mr. Brewer was a "two-edged sword" which jurors were only allowed to use to cut against the defendant. Because of this unconstitutional limitation on the consideration of relevant mitigating evidence, the judgments of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX A

STATEMENTS OF INTEREST BY *AMICI CURIAE* CHILD WELFARE LEAGUE OF AMERICA, JUVENILE LAW CENTER, AND NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS:

Child Welfare League of America (CWLA) is an 84-year-old association of more than 1000 public and private child and family-service agencies that collectively serve more than 3 million abused, neglected and vulnerable children and youth every year. Since its inception in 1920, CWLA has been a leader in the development of quality programming, practices and policies in all areas of child welfare and child well-being. In our work with children and youth impacted by the juvenile and criminal justice systems, we have grown increasingly concerned about the link between child maltreatment and juvenile delinquency. CWLA advocates for policies and practices that seek to interrupt the path to criminal offending that is frequently the outcome for victims of child abuse and neglect. Because we know that children and adolescents have less capacity than adults to take care of themselves and make good decisions, we also advocate for policies and practices that recognize these fundamental differences and provide children and adolescents with the supports they need to negotiate the path to adulthood. In all of our work, we strive to ensure that every child and young person is protected from harm, injustice and discrimination and is provided with the opportunity to achieve his or her full potential.

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview

of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC has authored or co-authored many amicus briefs in this Court as well as other state and federal courts concerning the rights of children in the adult criminal justice system, and the importance of considering children's development and experience when sentencing them as adults.

National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a membership of more than 10,000 attorneys nationwide – along with 80 state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice. In furtherance of its objectives NACDL files approximately 35 *amicus curiae* briefs a year, including at least ten *amicus curiae* briefs in the United States Supreme Court, on a variety of criminal justice issues. *See* NACDL's website at www.nacdl.org.

APPENDIX B

Examples of States With Mandatory Reporting Statutes That Require All Persons to Report Child Abuse, in Lieu of or in Addition to Requiring Certain Specified Professionals or Institutions to Report Child Abuse.

Delaware, DEL. CODE. ANN. tit. 16, § 903 ("*Any other person* who knows or in good faith suspects child abuse or neglect shall make a report") (emphasis added).

Florida, FLA. STAT. § 39.201(1)(a) ("*Any person* who knows, or has reasonable cause to suspect, that a child is abused, abandoned, or neglected . . . shall report such knowledge or suspicion.") (emphasis added).

Idaho, IDAHO CODE ANN. § 16-1605(1) ("*Any . . . other person* having reason to believe that a child under the age of eighteen (18) years has been abused, abandoned or neglected or who observes the child being subjected to conditions or circumstances which would reasonably result in abuse, abandonment or neglect shall report or cause to be reported.") (emphasis added).

Indiana, IND. CODE § 31-33-5-1 ("*An individual* who has reason to believe that a child is a victim of child abuse or neglect shall make a report") (emphasis added).

Kentucky, KY. REV. STAT. ANN. § 620.030 ("*Any person* who knows or has reasonable cause to believe that a child is dependent, neglected or abused shall immediately cause an oral or written report to be made.") (emphasis added).

Maryland, MD. CODE ANN. [FAM. LAW] § 5-705(a)(1) ("*A person* in this State other than a health practitioner, police officer, or educator or human service worker who has

reason to believe that a child has been subjected to abuse or neglect shall" notify) (emphasis added).

Maryland, MD. CODE ANN. [FAM. LAW] § 5-704(a)(1) ("Each health practitioner, police officer, educator, or human service worker, acting in a professional capacity in this State" shall notify).

Mississippi, MISS. CODE ANN. § 43-21-353(1) ("*Any other person* having reasonable cause to suspect that a child is a neglected child or an abused child, shall cause an oral report to be made immediately") (emphasis added).

Nebraska, NEB. REV. STAT. § 28-711 ("When *any . . . other person* has reasonable cause to believe that a child has been subjected to child abuse or neglect or observes such child being subjected to conditions or circumstances which reasonably would result in child abuse or neglect, he or she shall report such incident or cause a report of child abuse or neglect to be made.) (emphasis added).

New Hampshire, N.H. REV. STAT. ANN. § 169-C:29 ("*Any other person* having reason to suspect that a child has been abused or neglected shall report the same") (emphasis added).

New Jersey, N.J. STAT. ANN. § 9:6-8.10 ("*Any person* having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse shall report.") (emphasis added).

New Mexico, N.M. STAT. § 32A-4-3 ("*Every person* . . . who has information that is not privileged as a matter of law, who knows or has a reasonable suspicion that a child is an abused or a neglected child shall report the matter immediately.") (emphasis added).

North Carolina, N.C. GEN. STAT. § 7B-301 ("*Any person* or institution who has cause to suspect that any juvenile is abused, neglected, or dependent . . . or has died as the result of maltreatment, shall report.") (emphasis added).

Oklahoma, OKLA. STAT. tit. 10 § 7103.A.1 ("*Every . . . other person* having reason to believe that a child under the age of eighteen (18) years is a victim of abuse or neglect, shall report the matter promptly.") (emphasis added).

Rhode Island, R.I. GEN. LAWS § 40-11-3(a) ("*Any person* who has reasonable cause to know or suspect that any child has been abused or neglected . . . or has been a victim of sexual abuse by another child shall, within twenty-four (24) hours, transfer that information to the department for children and their families or its agent.") (emphasis added).

Tennessee, TENN. CODE. ANN. § 37-1-403(a)(1) ("*Any person* who has knowledge of or is called upon to render aid to any child who is suffering from or has sustained any wound, injury, disability, or physical or mental condition shall report such harm immediately if the harm is of such a nature as to reasonably indicate that it has been caused by brutality, abuse or neglect or that, on the basis of available information, reasonably appears to have been caused by brutality, abuse or neglect.") (emphasis added).

Texas, TEX. [FAM.] CODE ANN., § 261.101(a) ("*A person* having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect . . . shall immediately make a report.") (emphasis added).

Utah, UTAH CODE ANN. § 62A-4a-403(1) ("*When any person* . . . has reason to believe that a child has been subjected to

incest, molestation, sexual exploitation, sexual abuse, physical abuse, or neglect, or who observes a child being subjected to conditions or circumstances which would reasonably result in sexual abuse, physical abuse, or neglect, he shall immediately notify") (emphasis added).

Wyoming, WYO. STAT. ANN. § 14-3-205(a) ("*Any person* who knows or has reasonable cause to believe or suspect that a child has been abused or neglected or who observes any child being subjected to conditions or circumstances that would reasonably result in abuse or neglect, shall immediately report it.") (emphasis added).

APPENDIX C

Examples of States With Mandatory Reporting Statutes That Require Clergy Members to Report Child Abuse and Provide No Exception for the Clergy-Penitent Privilege.

New Hampshire, N.H. REV. STAT. ANN. § 169-C:32 ("The privileged quality of communication between ... any professional person and his patient or client, except that between attorney and client, shall not apply to proceedings instituted pursuant to this chapter and shall not constitute grounds for failure to report as required by this chapter.").

North Carolina, N.C. GEN. STAT. § 7B-310 ("No privilege shall be grounds for any person ... failing to report that a juvenile may have been abused, neglected, or dependent, even if the knowledge or suspicion is acquired in an official professional capacity, except when the knowledge or suspicion is gained by an attorney from that attorney's client during representation only in the abuse, neglect, or dependency case.").

Oklahoma, OKLA. STAT. tit. 10, § 7103.A.3 ("No privilege or contract shall relieve any person from the requirement of reporting pursuant to this section.").

Rhode Island, R.I. GEN. LAWS § 40-11-11 ("The privileged quality of communication between ... any professional person and his or her patient or client, except that between attorney and client, is hereby abrogated in situations involving known or suspected child abuse or neglect and shall not constitute grounds for failure to report as required by this chapter.").

Texas, TEX. [FAM.] CODE ANN. § 261.101(c) (Texas itself provides that "[t]he requirement to report ... applies without exception to an individual whose personal communications may otherwise be privileged, including ... a member of the clergy.").

West Virginia, W. VA. CODE § 49-6A-7 ("The privileged quality of communications ... between any professional person and his patient or his client, except that between attorney and client, is hereby abrogated in situations involving suspected or known child abuse or neglect").